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REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

Supreme Court of Appeals

OF

VIRGINIA:

WITH SELECT CASES

RELATING CHIEFLY TO POINTS OF PRACTICE,

DECIDED BY THE

SUPERIOR COURT OF CHANCERY FOR THE RICHMOND DISTRICT.

VOL. I.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

PHILADELPHIA.

1808.

Va 11

DISTRICT OF VIRGINIA, TO WIT:

BE IT REMEMBERED, that on the eighth day of June, in the thirty-second year of the Independence of the United States of America, William W. Hening and William Munford, of the said district, have deposited in this office, the title of a book, the right whereof they claim as authors, in the words following, to wit:

" Reports of Cases argued and determined in the Supreme Court " of Appeals of Virginia: with Select Cases, relating chiefly to Points " of Practice, decided by the Superior Court of Chancery for the " Richmond District. Vol. I. By William W. Hening and William " Munford."

In conformity to the Act of the Congress of the United States entituled " An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies during the times therein mentioned," and also to an act entituled " An Act supplementary to an Act, entituled, an Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned. And extending the benefits thereof to the arts of designing, engraving, and etching historical, and other prints."

(L.S.)

WILLIAM MARSHALL,
Clerk of the district of Virginia.

JUNE 11-1929
LRR

PREFACE.

IN presenting the following Reports to the public the authors cannot resort to a very usual apology, "that the notes were taken merely for their own private use." We commenced them *professedly* with a view to disseminate the decisions of the SUPREME COURTS OF VIRGINIA, as *early*, and in as *authentic a manner as possible*. Whatever imperfections then may be found in the work must be ascribed to the *nature* of the undertaking,—to our inexperience in such pursuits,—or, we hope, to *any cause* rather than the want of a sacred regard to TRUTH.

Of all the duties which devolve on a Reporter, certainly none are more important than those relating to the *state of the case* and the *opinions of the Judges*. With respect to the *first* of these objects, we have uniformly endeavoured to give a concise and accurate statement of the points in controversy, and of such circumstances in each case as were necessary for its elucidation. In order to accomplish this, we have not confined ourselves to the *briefs of counsel;* but, whenever any fact or circumstance, *omitted in them*, appeared, from the *argument* or *decision*, to be of importance, we have invariably

consulted the *records* themselves. As to the *second* object, the *notes* of the Judges (which they were so obliging as to furnish) have precluded the possibility of any inaccuracies. None, it is believed, will be discovered, except such as are merely typographical.

But the most embarrassing part of our whole undertaking related to the *arguments of counsel.* To give them *at large*, we were sensible, would swell the volume to an enormous size. To omit them altogether, and insert merely the *positions* advanced by counsel without their *reasons* in support of them, would not only convey a very inadequate idea of the merits of the several speakers, but often leave the case perfectly unintelligible. We therefore determined to pursue such a *middle* course, as would guard against too much *prolixity*, on the one hand, and too much *brevity*, on the other. This we found to be a work of infinite delicacy and difficulty.—Counsel often take a wide range in argument, and dwell, with great zeal and ability, on points which the Judges do not think it necessary to consider, *in that particular cause.* Indeed, it is frequently impossible for the counsel to know beforehand what special grounds of law or equity will influence the opinions of the Judges. Hence it is that a considerable proportion of the notes taken by a Reporter during a discussion have no application to those points which, *by the court*, are regarded as essential to the decision. The business of selection is, of course, very laborious;—for (strange as it may appear,) it is strictly true that we could report *at full length*, with much greater facility, and in one third of the time that is requisite to *abridge*, so as to insert *such arguments only* as were applicable to the points decided, excluding, *even from them*, everything but the *substance* in a condensed form. Yet it has been indispensibly necessary to adopt this plan. For, were we to

act otherwise,—were we to mention all the doubts and objections suggested by the ingenuity of able counsel, we should furnish materials for litigation, instead of communicating the LAW as settled by the highest judicial tribunal of our country. These remarks are due to the cause of truth; and, while we hope they will be considered by the gentlemen of the bar as a sufficient apology for the brevity with which their arguments are reported, we think it but just to say, that the extent of *their talents* ought not to be estimated by the *epitomes* which *we* have presented. In a few leading cases, however, in which *great principles* were settled, we have felt ourselves at liberty to indulge in a more diffuse manner: particularly in the case of SMITH *and* WIFE *v.* CHAPMAN, (which is more like a digest of the law relative to an important subject than a report of a single case,) we were induced, by the advice of those in whom we justly reposed the highest confidence, to give the arguments of the counsel on both sides nearly as they were delivered. If, in that, and a few other cases, they shall still appear too lengthy to some of our readers, we trust that due allowance will be made when they reflect that the plan of *speedy* publication would not permit us, in every instance, to perform *effectually* the task of abbreviating, engaged as we have been in various professional and public duties. Yet, we believe, the attentive and candid reader will acknowledge, that, *generally*, the arguments are comprised in as narrow a compass as possible, consistently with a clear understanding of the grounds of the several decisions.

From the BENCH, the BAR, and the OFFICERS OF THE COURT, we have received the most liberal assistance; for which we request them, individually, to accept our grateful acknowledgments.

To the PUBLIC, also, our thanks are due for the encouragement the work has hitherto experienced; and we avail ourselves of this opportunity to declare, that it will be carried on, according to its original plan, so long as that encouragement shall be continued.

WILLIAM W. HENING,
WILLIAM MUNFORD.

Richmond, June 1st, 1808.

A TABLE

OF THE

NAMES OF THE CASES

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N. B. This Table is so arranged that each Case may be found as well by the name of the *defendant* as of the *plaintiff*. The letter "*v*" (for *versus*, or *against*) follows the name of the plaintiff; the word "*and*," that of the defendant.

☞ The Cases, the names of which are printed in *Italicks*, are to be found in the notes.

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ERRATA.

OWING to the distance of the authors from the Press during the greater part of the impression, the following typographical errors have occurred, which the reader is requested to correct with a pen, before he peruses the book.—The letter "*t*" following the number of the line, denotes so many lines from the *top* of the page; the letter "*b*," from the *bottom*.

Page.	Line.	
211	12 *b*	*for* "argument" *read* "agreement" From page 213 to 220 both inclusive, the paging is improperly numbered 113, &c. From page 210 to 220, the running title is erroneously numbered, in the "32nd" instead of the "31st" year of the Commonwealth.
119 (properly 219)	19 *b*	*for* "on" *read* or.
246	19 *t*	— "Clue" —— Clive.
261	1 *b*	— "the" —— their—*& for* "of" *read* to.
301	5 *b*	— "transmitted" —— transmuted.
305	4 *b*	— "and" —— on.
306	12 *b*	— "his" —— the, *before the word register.*
308	18 *t*	— "prevent" —— present.
——	22 *b*	— "revolved" —— involved.
315	16 *b*	— "professing" —— possessing.
359	4 *b*	— "give" —— gave.
361	20 *t*	— "also" —— who.
376	5 & 21 *t*	— "scaled" —— sealed, *and for* "*Nonny*" read *Nanny.*
390	9 *t*	— "omitted" —— admitted.
401	15 *t*	— "*after the word* "may," *insert* "be."
415	21 *b*	*strike out the point between* "appellee" *and Charles.*
420	20 *b*	— "from" —— for.
422	3 *b*	*after* "corruption" *insert* "tried."
563	17 *b*	*in the margin, instead of* "for" *read* "of."
574	14 *t*	*after figure* 92, *insert* "section" *instead of figure* "5."
584	17 *t*	*for* "out" *read* not.
592	15 *t*	— "an" —— in.

RULES

OF THE

COURT OF APPEALS

FROM ITS ESTABLISHMENT TO THE END OF MAY TERM, 1806.

APRIL 29, 1784.

IN all cases, whether of appeal, adjourned for difficulty, writ of error, or otherwise, the court will proceed to a hearing at the term next succeeding that to which such case shall be returned or sent up, unless for good cause the court shall, in any case, rule a hearing at the first term.

NOVEMBER 6, 1786.

THE court will hear no case, brought before it by appeal, by adjournment for novelty or difficulty, by writ of error, or otherwise, in the term to which the record in that case shall be returned or sent up, unless reasonable notice be given of a motion to be made for such hearing.

NOVEMBER 13, 1787.

IN all criminal cases adjourned from the General Court, the court will proceed to a hearing in the term to which the record is returned, unless good cause be shewn to the contrary.*

JULY 1, 1790.

ORDERED, that no affidavits be read in support of, or opposition to, any motion hereafter made to the court, unless reasonable notice be given to the opposite party of the time and place of taking the same, or good cause be shewn why such notice is not given.

Ordered, that objections to securities given upon obtaining writs of supersedeas, writs of error, or appeals, shall hereafter be made to that court to which the writ or record shall be returnable, and not afterwards.

* By an act of assembly passed on the 26th day of October, 1792, it is declared that "it shall not be lawful for the High Court of Chancery, or General Court to remove before the Court of Appeals, by adjournment, any question, matter or thing, whatsoever."

OCTOBER 28, 1795.

ORDERED, that when an appeal is entered from a judgment of the District Court and the record is not transmitted to the clerk of this court before the end of the second term after the appeal is granted, the record shall not be received, and the cause docketed, but by leave of the court, to be obtained on motion, and for good cause shewn; of the time of making which motion, reasonable notice shall be previously given to the other party.

NOVEMBER 18, 1803.

IN all cases, whether of appeal, writ of error, or otherwise, the court will proceed to a hearing, at the term to which such case shall be returned or sent up, unless good cause shall be shewn to the contrary.

MAY 15, 1804.

A CLEAR and concise state of the case of each party in an appeal, writ of error or supersedeas from a decree of the High Court of Chancery, or any District Court in Chancery, or from a judgment of the General Court or any District Court, in which a demurrer, special verdict, case agreed, demurrer to evidence, bill of exceptions, or point reserved, shall constitute a part of the record, or exhibits in the cause, with the points insisted on, signed by his counsel and printed or fairly transcribed, the expense whereof shall be taxed in the bill of costs, shall after the end of this present term, be delivered to each Judge time enough before the hearing of the cause: And that no error, other than such as shall be pointed out and insisted on in such statement, on the part of the plaintiff or appellant, shall be (without leave of the court) admitted as a ground for argument on the hearing of the cause, or for reversal of the decree or judgment sought to be reversed. And that all depositions and exhibits, accounts and articles, intended to be relied upon or objected to in the argument, be particularly noticed in such state, and recited, and a reference thereto in the official copy of the record in the cause, made.

MAY 21, 1804.

AFTER the end of this present term, all causes depending in this court, which shall be ready for hearing in pursuance of the rule of this court made on the 15th day of this present month, shall, unless good cause be shewn to the contrary, be heard in the same order in which they stand upon the docket.

MAY 16, 1805.

ORDERED, that no petition for an appeal to reverse any decree of any inferior court for error in such decree, shall hereafter be received or allowed by this court unless the nature of the case, and the errors supposed to exist in the decree sought to be reversed, be clearly and distinctly set forth in such petition and the same be signed by the party, or the counsel preferring the same, or some other counsel practising in this court.

MAY 5, 1806.

THE multiplicity of suits upon the docket of this court, whilst it furnishes a reason why the court should for good cause shewn, grant a speedy hearing in certain cases of peculiar hardship, or general inconvenience, on the other hand admonishes the court not to postpone the hearing of causes long depending in court, in which the parties may be no less anxious for a speedy decision, and in which the hardship and inconvenience may possibly be as great as in any others, unless the reasons assigned for giving a priority to later cases be, not only extremely strong, but presented to the court in a manner which can leave no doubt in the breast of the court of the propriety of giving the preference asked for. This, it is the opinion of the court, can only be done by a clear and candid state of the case, and of the facts on which the reasons for departing from the regular course, are founded, verified by affidavit, where such can be obtained, or signed by the counsel preferring the petition, who will thereupon be regarded by the court as pledging his honor for the truth thereof; notice of which by presenting a copy of the petition to the counsel for the adverse party is to be given at least four days before the petition shall be presented to the court. And in case the petition is intended to be opposed, the adverse counsel are to present to the court and the counsel for the petitioner, in writing, the reasons for such opposition, verifying or denying in the same manner any facts which may be relied on in support of, or opposition to the petition, at least one day before the petition shall be presented; which, matters so stated, the court will take into consideration without argument, and decide thereupon as to them shall seem most reasonable.

RULES OF PRACTICE

Settled by the late High Court of Chancery, and present Superior Court of Chancery for the Richmond District.

1. THE causes on the court docket must be called and tried in the order they stand; unless for good cause shewn, a cause may be passed over or continued.

2. In every cause brought before the court, for trial, the counsel for the plaintiff must read the papers and open his cause: he will be answered by the counsel for the defendant; who will be replied to by the plaintiff's counsel and this will end all discussion.

3. But two counsel, will be allowed to argue on one side of any cause, without *leave* of the court, which may *never* be asked for, unless in a case of importance and difficulty.

4. Counsel must prepare notes for their decrees.

5. Whatever the parties, by counsel, agree to do, in any cause depending, they may direct the clerk to enter accordingly, without troubling the court.

6. The rules in the office will be strictly conformable to the act of Assembly, unless by consent of parties, and so to be entered, by the clerk.

7. All the papers or documents referred to by any bill as part thereof, must be filed with it, or the suit may be dismissed, as for the want of a bill.

8. No cause is to be brought on the court docket, at any time, unless it be ready for trial, against all or some of the defendants against whom relief is really sought.

9. No suit, shall be re-instated, that has been dismissed, in court, unless for good cause shewn, and upon re sonable notice thereof to the adverse party or his counsel.

Altered from May 27, 1788

10. Objections to securities given for the prosecution of any suit, in this court, may be made at any time, during the pendency of such suit, upon giving to the adverse party reasonable notice thereof.

November 21 1785.

11. No objection, to any deposition, for want of notice, shall be received, after the cause is set for hearing, unless such objection be filed previously thereto.

12. Commissions, to take depositions, may issue at any time, after the cause, in which they may be required, is set for hearing, without any application to the court for that purpose; and exceptions to the reading of *such* depositions, may be made, at any time, before the hearing of the cause.

13. That the papers read at the hearing of any cause, in this court, in which an issue may be directed, may be read, upon the trial of such issue, before the court of common law, to avail there, as much as they ought to avail here; but, that exceptions there, to such testimony, may be made as in other cases. September 26 1796, & Sept. 28, 1805.

14. Suits brought for dower, for alimony, or for freedom, notwithstanding the rule before laid down, may be tried at the first term after they are set down for hearing.

15. Suits for the division of estates, or upon mortgages, where they present great and peculiar hardship, verified either by affidavit, or the statement of counsel, who will be regarded by the court, as pledging his honor for the truth of the facts stated, and to which he must subscribe his name, may always be put into the hands of the judge in vacation, as soon as they are ready for hearing, that they may be determined by the succeeding court, without loss of time.

16. That in all cases where accounts are directed, the commissioner shall proceed ex-parte, upon one month's notice to the party, who shall fail to attend; but he may for good cause shewn give a farther day; but he must make the same a part of his report. November 13 1788.

17. All reports made by the master commissioners of this court, in matters of account, must lie until the term succeeding that to which they are made, before they are acted upon, by the court, unless for *good cause* shewn.

18. To all such reports, exceptions, if to be taken, must be stated in writing, and filed with the clerk of this court, thirty days preceding the *term*, at which they *may* be acted upon. Altered from August 11, 1790.

19. The trial of suits in which accounts have been directed, and not reported, will not be delayed or continued *merely* on that account, but will be tried or not, according to the circumstances of each case.

20. The first and last day of every term, and every Saturday during the term, shall be motion day.

21. The injunctions upon the motion docket shall be all called over in the order they stand, every motion day, and taken up or not, as the counsel for the defendant shall think proper.

22. The counsel shall then be called over, beginning with the attorney general first, and the rest in the order they qualified in court, that each may be heard in such motions as are not docketed; but no gentleman will be allowed to make more than one motion at a time.

23. In every case where a bill is presented for an injunction, the documents referred to as a part thereof must accompany the bill, before the subject will be considered by the court, or the judge thereof in vacation, unless for *good cause* shewn.

24. In no case will a second application for an injunction be heard, either in court, or by the judge thereof in vacation, without notice to the adverse party, unless for *good cause* shewn.

25. In all cases where bond and security must be given with the clerk of this court, and no time is fixed upon by law, in which it must be done: then, it must be given within thirty days, unless otherwise directed by the court, or the judge in vacation, or the order under which it is directed, will not avail the party any thing.

26. The affidavits that have been read, upon a motion to dissolve, in case the suit should for good cause shewn, be carried on as an original suit in chancery, will be regarded by the court as testimony, on the final hearing of the cause, unless they be objected to at the time cause shall be shewn against the dismission of such suit, and notice thereof given to the adverse party, which will be sufficient if indorsed on the papers in the cause, or entered at the rules with the clerk of this court.

27. Objections to affidavits, taken on motions to dissolve injunctions, must be made before any such motion, by stating the objection on every such affidavit.

28. In all cases where affidavits are to be read in support of, or in opposition to, any motion to be made in court, or to the judge thereof in vacation, reasonable

notice must be given to the adverse party, of the time and place of taking the same.

29. The clerk shall keep a docket of all injunctions put down for dissolution, noting therein the day each case is put down, for the inspection of counsel, which shall be deemed sufficient notice thereof to the adverse party. November 21 1785.

30. No motion shall be admitted for dissolving an injunction unless the answer shall have been filed before the commencement of the term, in which the motion is offered, except in cases of injunctions granted within three months preceding such term. Ibid.

31. Between the last rule-day preceding every term, and its commencement, the clerk must regularly go through all the causes depending, and enter in the order book, all such orders and decrees, as would in the next term, be matters of course, that on the first day of such term, they may be read, corrected and signed, as the orders of the day.

32. On the last day of every term the clerk must call over all the injunctions dissolved at the preceding term, and dismiss them, unless good cause to the contrary be shewn.

On Sunday the 8th day of June 1806, the Venerable GEORGE WYTHE, Judge of the Superior Court of Chancery for the Richmond District, departed this life, in the eighty-first year of his age, and on the 14th of the same month, CREED TAYLOR, Esquire, was appointed his successor, who took his seat accordingly, at the ensuing term.

SELECT CASES

RELATING CHIEFLY TO POINTS OF PRACTICE,

DECIDED BY

THE SUPERIOR COURT OF CHANCERY FOR THE RICHMOND DISTRICT:

IN THE THIRTY-FIRST YEAR of the COMMONWEALTH,

CREED TAYLOR, Esquire, Chancellor.

ROSS *against* PLEASANTS, SHORE & Co. and others.

Wednesday, 10th September, 1806.

IN this case, the only question was, whether the plaintiff should be ruled to give other security for prosecuting the injunction granted him in 1798, the present security being insufficient.

If at any time, the security for prosecuting an injunction shall prove to be insufficient, the court will require unexceptionable security to be given.

The court directed that, unless unexceptionable security be given on or before the last day of the present term for prosecuting the said injunction, it should stand dissolved as an act of this day.

WHITE *against* FITZHUGH, LEWIS and JOHNSTON.

Thursday, 11th September.

THE complainant obtained an injunction in this court to stay proceedings at law upon a judgment of the District Court of *Fredericksburg*, recovered in the name of the defendant *Fitzhugh*, for the benefit of the defendant *Johnston*, to whom the bond, on which the judgment at law was rendered, had been transferred by the defendant *Lewis*, without assignment; and, before the answers came in, the defendant *Fitzhugh*, died.

A court of equity will not at the instance of a party asking a *favor*, grant it, by imposing conditions on the other party.

Botts, for the defendants, moved for an order, that unless the complainant would agree to appear at the next court to be holden for the district of *Fredericksburg*, and

When an injunction has abated by the death of the defendant, the court will make a rule that it shall stand dissolved, unless the complainant will revive it against the representatives of the defendant, within a given time after they shall have qualified.

SEPTEMBER 1806.

WHITE *against* FITZHUGH, &c.

there consent that the judgment at law should stand and be revived in the name of such person as might, in the mean time, take administration upon the estate of the defendant *Fitzhugh*, the injunction should be dissolved, without discussing its merits. Of this application notice had been given to the plaintiff.

By the Court. In a court of equity, the party applying for relief is sometimes subjected to conditions, which must be complied with before such relief can be obtained; for example, if the complainant was now asking for his injunction, the usual conditions would be imposed, and one would be that he should consent to revive the judgment at law:....But it never has been the practice of this court, at the instance of a party asking a *favor*, to grant it, by imposing conditions upon the other party.

The motion is therefore over-ruled.

But the court will have no objection to make a rule upon the complainant, that the injunction shall stand dissolved, unless he will revive it against the representatives of *Fitzhugh*, within a given time after they shall have qualified. The defendant, then, for whose benefit the judgment was obtained, may, in their names, proceed to renew it in the course prescribed by law.

Monday, 15th September.

VASS *against* MAGEE.

When an injunction has been granted and a trial at law directed, the court if it is satisfied that the injunction ought to have been dissolved, will, notwithstanding no verdict has been certified set aside the order for a new trial, & dissolve the injunction.

IN this case an injunction was awarded to stay proceedings on a judgment of the District Court of *Fredericksburg*, and in March last, a new trial of the suit at common law was directed, but no verdict having been certified, the defendant moved to set aside the order directing such trial, and to dissolve the injunction. The cause stood upon the motion docket. The motion was objected to upon the ground that the court will not interfere where a new trial has been directed, but will wait the event of such trial.

By the Court. From an examination of the papers in this case the court will be able to decide more correctly upon the objection made to the motion: but will now observe, that, while the former decisions of this court, which have produced interlocutory orders, will be very much respected, and not interrupted upon slight occasions, yet such orders will not, in themselves, be sufficient to prevent

a motion like the present, or the hearing of a cause, regularly called, upon the court-docket. In every such case, the court will inspect the papers, and be regulated by what shall appear just and reasonable.

SEPTEMBER 1806.

VASS *against* MAGEE.

In the present case, the court, having very diligently examined the papers to discover the grounds on which the injunction was granted, is perfectly satisfied that it should have been, upon the former motion, *dissolved*, and that of course, a new trial should not have been directed.

The order, therefore, of March last, directing such trial, must be set aside and the injunction now *dissolved*.

JONES *against* JONES.

Tuesday, 16th September.

An attachment will not lie for one *joint* compl't against another, who has received more than his proportion of a decree.

THIS was a motion on behalf of *Robert Jones*, for an attachment against *Ambrose Jones*, for a contempt in obstructing a decree of this court, of which motion notice had been duly given. The parties had been joint plaintiffs in a suit against *Thomas Davis*, for some negroes and their profits; and had obtained a decree in March, 1805, from which the defendant, in that suit, had appealed: in May, of the same year, the appeal was withdrawn, and so much of the decree, as directed an account of the profits was set aside. No process was ever issued to enforce the residue. The defendant now before the court, was said to have received to his *own use*, the whole of the profits of the negroes, and to have refused to account with the plaintiff in this motion, for his proportion thereof; wherefore it was alledged that he obstructed the execution of the said decree.

By the Court. This case presents a decree for the negroes only....there is no decree for their profits. If there had been such a decree in favor of the plaintiffs *jointly*, then a payment to one would have been a payment to both, and, if in full, *Davis* would have been discharged, but the other plaintiff would not, in consequence thereof, have been entitled to an *attachment*. If the injury does exist, the remedy is plain, but not in the way proposed. The motion must therefore be over-ruled, *with costs, including an attorney's fee.*

SEPTEMBER 1806.

Wednesday, 17th September.

PARKER *against* PITTS.

A motion on a forthcoming bond can only be made on the day to which the notice is given, unless the defendant be called, and the motion entered and continued.

THIS was a motion for an award of execution upon a forthcoming bond. The notice had been given to a preceding day of the term; but the motion was not then made; the defendant was not called; nor the motion entered and continued.

By the Court. The *bar* will be pleased to take notice that although this kind of practice has obtained, by *their* consent, in this court, and upon that ground has been sanctioned by the Court of Appeals, yet, should the present Judge sit here at the next term, he will feel it his duty no longer to tolerate a practice in express opposition to a law of the land.

Monday, 22d September.

BROWN *against* BRENT.

It is not usurious upon a settlement of accounts to take a bond or note for the balance due including interest, and to receive interest on such bond or note.

THE complainant had assumed, on account of a certain *L. Ashton*, to pay the amount due on a mortgage made by one *Garrard*, to the defendant. He afterwards paid a part, and gave a promissory note to the defendant for the balance, consisting of the principal and interest added together. Upon that note a judgment at law was obtained, to be relieved against which the present suit was instituted, and an injunction awarded. The bill stated, that when the complainant gave his note, the defendant assured him that the said *Ashton* had agreed to pay him compound interest, and that, if he did not acknowledge it upon application, he, the defendant, would release it; and that the said *Ashton*, upon an application made to him, had denied that he ever had agreed to pay the defendant more than simple interest. The defendant, in his answer, having denied the existence of the particular agreement stated in the bill, and there being no evidence to prove the same, the only question remaining was, whether the transaction was usurious or not.

By the Court. The application at present is for a dissolution of the injunction. It is not usurious, upon a settlement of accounts, to take a bond or note for the balance due, including interest, and to receive interest on such

bond or note. It is done every day in the usual course of business, and is even directed by law in every case where a forthcoming bond is taken, which is always for the amount of the execution, including interest, if any there be, and bearing a farther interest from the date thereof until payment. This being considered by the court as the established law of the land, the injunction must be *dissolved*.

September 1806.

Brown *against* Brent.

Guerrant *against* Fowler and Harris.

Monday, 22d September.

A person being without the commonwealth may be decreed to execute a conveyance for lands lying in another state, or to *cancel* a deed for such lands obtained by *fraud*.

THIS suit was brought to set aside a deed for *land in the state of Kentucky*, obtained by the defendants from the plaintiff, *by fraud*, as it is charged. The deed was made to *Harris*, who lives in Powhatan county....the other defendant lives in Kentucky. The defendants appeared and filed a plea in abatement to the jurisdiction of the court, because the land conveyed as aforesaid lies within the state of Kentucky.

By the Court. The counsel for the defendants has relied upon what he contends to be the true exposition of the statute by which this court was established, to shew that the legislature did not mean to allow to it jurisdiction in a case like the present. The words of the act are, "After answer filed, and no plea in abatement to the jurisdiction of the court, no exception for want of jurisdiction shall ever afterwards be made; nor shall the High Court of Chancery, or any other court ever thereafter delay or refuse justice, or reverse the proceedings for want of jurisdiction, except in cases of controversy, respecting lands lying without the jurisdiction of such court, and also of infants and *femes covert*." Rev. Code, p. 66, Pleasants' edition. It is alledged that one of the cases excepted in the act being that of lands lying without the jurisdiction of the court, it therefore has no jurisdiction in the present case. But the court is of opinion that, by a sound exposition of the act, it cannot be brought to bear upon the question; because the cases in the exception are not affected by any thing in the act; and therefore the law, as to these cases, stands as it was before it passed. This court, then, not being deprived of jurisdiction in the case before it, by a fair construction of the act, will proceed to examine how far it may have jurisdiction upon general principles.

SEPTEMBER 1806.

GUERRANT *against* FOWLER, &c.

In the case of Farley and Shippen, determined in this court, in March, 1794, and reported by the venerable sage who then presided, this question arose, whether a court of equity in this commonwealth could decree the defendants, who were within its jurisdiction, to convey to the plaintiffs land lying in the state of North Carolina. The court then determined that its power was general, over all persons subject to its jurisdiction within the commonwealth, and those acts which, in that case, they might be decreed to perform, must be such as, if performed in North Carolina, would be effectual; that a deed of bargain and sale executed *here*, to convey lands *there*, would be as effectual as if executed *there*; that, although the court could not, in execution of its decree, award a writ of sequestration against the lands lying in that state, yet it might award an attachment for contempt in refusing to perform the decree; and that it was no objection to the jurisdiction of the court, to say that the defendants, after they had been cited to appear, might remove, so as to prevent the process of attachment from having its effect.

The court now approving the principles of that decision, perceives no reason why, if a person living here may be decreed to execute a deed of conveyance for lands lying within another state, such person may not be decreed to *cancel* a deed obtained here, *by fraud*, for lands lying in Kentucky, should the case be made out.

The distinction is clearly this; that where the decree is to affect the lands directly, as in the case of a suit brought, in this court, to divide lands in another state, there the court would not have jurisdiction, although the parties live here, because its process could not be effectual; and, in a case like that, an exception to its jurisdiction might be taken on the final hearing of the cause, where the fact should appear upon the face of the proceedings, though no plea to the jurisdiction should have been put in. But where the decree is to affect only the *persons* of the defendants, in order to a complete execution of it, if the plaintiff succeeds, (which is the present case,) it is clearly held to be the settled law of the court, that jurisdiction thereof may be entertained. Lord Cranstown vs. Johnston, 5 Vez. jr. 182, is considered as clear authority on this subject. The plea of the defendants must be over-ruled, and they must be ordered to answer.

SEPTEMBER 1806.

Tuesday, 23d September

BYRNE *against* LYLE.

When no motion is made to dissolve an injunction, until the cause is regularly set for hearing on the court docket, the hearing shall then be final.

SEVERAL issues were, by a former order in this cause, directed to be tried at law, and the cause, *regularly, as was supposed*, brought on the court docket, after a motion to dissolve the injunction had been over-ruled; and now, a motion to set aside the order directing those issues upon the ground that they should not originally have been directed, and to dissolve the injunction, (as the court had done in the case of *Vass* vs. *Magee*) being made; the court, upon mature consideration, directed the order to be set aside and the injunction dissolved: upon which the plaintiff's counsel said, it was the course of the court, in all cases, where a motion was made to dissolve an injunction, and the cause stood on the court docket, to consider it as a final hearing, and therefore hoped in this case the decree would be final. The bill was accordingly dismissed, from which decree an appeal was asked and granted. But, some doubts being stated as to the practice, the court declared the rule to be, that in all cases where an injunction has been granted, and no motion made to dissolve, until the cause is *regularly set for hearing on the court docket*, the hearing shall then be final. Upon this being stated by the court, as the rule of practice in future, the counsel for the defendant shewed to the satisfaction of the court that this cause had been *irregularly* brought on the court docket, which the clerk said was the fact. The order for dismissing the bill was therefore set aside, and the injunction only dissolved. The plaintiff's counsel then prayed an appeal, which was denied.

Tuesday, 23d September.

RADFORD'S Executors *against* INNES'S Executrix.

A motion to dissolve an injunction

THIS was a motion to dissolve an injunction granted in November, 1804, to stay proceedings on a judgment of Henrico county court, obtained upon a bond executed by

ought never to be continued unless from *some very great necessity*.

The court of chancery is always open to reinstate, as well as to grant an injunction.

The complainant should always be ready to prove the allegations in his bill of injunction, even before an answer is filed.

SEPTEMBER 1806.

RADFORD'S EX'ORS. *against* INNES'S EX'X.

William Radford to *James Innes*. The bill stated that the bond was given for the purchase money of a tract of land in the state of Ohio; that, in consequence of the interference of surveys made on behalf of other persons prior to that of *Innes*, it appeared that the estate of *Radford* the testator of the complainants would lose 173 acres, part of the tract which he had bought. As presumptive evidence of this, the complainants exhibited a plot and certificate of survey, signed by a surveyor in the state of Ohio, and found among the papers of *William Radford*, but which was not duly authenticated. The answer (which was filed in March, 1806,) denied the allegations in the bill, and demanded proof of their truth.

The *Attorney General* and *Munford*, for the complainants, moved for a continuance, alledging that they could, at the next term, be prepared to shew that the allegations in the bill were true, by evidence which they could procure from the state of Ohio, but had hitherto been prevented from obtaining by the great distance of the residence of the complainants from that state, and the difficulty of having such subjects, as taking testimony so far off, attended to.

Copland, on the other side, contended that a continuance ought not to be granted, it being inconsistent with the practice of the court; and because the injunction had been awarded nearly two years, during which time the complainants might have availed themselves of any testimony deemed essential in their cause.

In reply, it was said that the answer had been lately filed, and that, until then, the complainants were not informed of the points intended to be controverted.

By the Court. The reasons assigned for a continuance are not sufficient to induce the court to depart from the general rule; and that is, never to continue a motion for the dissolution of an injunction, *unless from some very great necessity*, because the court is always open to grant, and, of course, to reinstate an injunction, whenever it shall appear proper to do so, and because too the plaintiff should always be ready to prove his bill. The injunction must be dissolved.

SEPTEMBER 1806.

Tuesday, 23d September.

CALLOWAY and STEPTOE *against* TATE.

When partnership accounts are referred to a commissioner, the court will rule the parties to produce before him any books and papers which may relate to the partnership but will direct the commissioner to disregard such parts as relate to the private affairs of either party.

THIS cause, originally instituted in the court of Campbell county, for a settlement of the mercantile accounts of *Tate & Co.* in which the complainants were partners, was removed to this court by *certiorari*, awarded, on the application of the defendant.

The firm was constituted without any written agreement, or articles of copartnery. The complainants alledged that the copartnership commenced in 1791; the defendant contended, that although he had assumed the style of *Tate & Co.* so early as 1791, for the purpose of giving him a credit, yet no partnership existed till 1794. On this point, it was understood, there was a contrariety of evidence, all of which had not been taken.

Randolph and *Wirt*, for the complainants, moved for an order of reference of the accounts to a commissioner, with instructions, to commence with the accounts of 1791, and that the defendant produce to the commissioner, all the books of *Caleb Tate & Co.* from that period. They were prepared, they said, to shew that the copartnership commenced at that time; and that all the steps taken by the defendant in the court below were calculated for delay.

Wickham and *Call* for the defendant, opposed the motion, on principle. No delay, they assured the court, was desired by the defendant; but before an account was directed, with *special instructions*, it was necessary that the fact on which the parties were at issue, with respect to the commencement of the copartnership, should be decided by the court, on evidence, all of which had not come in; though they were authorised to say enough would appear among the papers to ascertain that the copartnership did not commence till 1794. The course of the court, they said, is to order a *general* reference of accounts, at any stage of the cause, after bill and answer, when it may appear necessary to a final decree; but an order, with *special directions*, is never made, except when the cause is ready for hearing, and then not without notice to the adverse party of the intended application. Nor will the court ever order particular books and papers to be produced to a commissioner, till it shall appear from the evi-

SEPTEMBER 1806.

GALLOWAY, &c. *against* TATE.

dence, that they relate to the copartnership, which is the subject of controversy, and are not the mere private books and papers of the party. In the case of *Morris* and *Alexander*, a motion was often repeated to compel a production of the books of "William Alexander & Co." but, on the suggestion of the defendant that they contained his own private accounts also, it was as often resisted by the court. And the Judge holding the principle sacred, that a man's private accounts could not, without his own consent, be submitted to the inspection of any person whatever, would never go further than to order that the books which were opened by *Alexander* as the factor of *Morris*, should be produced to the commissioner, with this express reservation, that he should not inspect any of the private accounts of *Alexander* contained therein, unless they were particularly referred to in some of the partnership accounts.

By the Court. To determine now the time at which the copartnership commenced would be to decide prematurely one of the principal questions in the cause. But the court has no objection to order the account to be taken from such period of time as either party may require; and as the books kept by the defendant between 1791 and 1794, were in the name of Caleb Tate & Co. in which several entries appear, charging the complainants individually with a proportion of the expenses of the firm, those books must be produced to the commissioner; with this restriction, if desired by the defendant's counsel, that he shall take no notice of any entry which relates to the mere private affairs of the defendant.

Tuesday, 23d September.

BACHELDOR *against* ELLIOTT'S Adm'r. & others.

When a creditor of a person deceased has a *remedy* against his executor or administrator *at common law*, he cannot *sue in chancery* to establish his demand.

THE bill in this case was exhibited against the defendant and his securities for the administration of his intestate's estate to recover the amount of an account for carpenter's work, done by the plaintiff, for the said intestate in his lifetime. It charged the administrator, among other things, with making a partial inventory and appraisement of the assets, without returning any account of sales; and alledged that the goods appraised were sold, at an under value, and purchased by the family of the intestate; and that the administrator pretended he had fully administered all the assets. It therefore prayed that an ac-

count might be taken of the administration of the defendant before a commissioner of this court, and that, in case he should fail to pay the sum which might finally be decreed against him, his securities, the other defendants, might be compelled to do it for him. To this bill there was a plea to the jurisdiction of the court, stating that the claim was cognizable *only* in a court of common law; and the administrator by way of answer, also stated, that he had made out and returned an inventory; that the estate was fairly and publicly sold; and that he and his brother were the buyers; that he had fully administered the assets, and that, for want of assets, debts of a superior dignity were still due. The court heretofore over-ruled the plea, and directed one of the commissioners to take an account of the administration; and also directed an issue at law, to ascertain how much money was due from the intestate to the complainant. The verdict of the jury thereupon was certified and the cause now came on to be finally heard.

SEPTEMBER 1806.

BAGHELDOR *against* ELLIOTT'S Adm'r. &c.

The securities for an executor or administrator cannot be sued in equity until a *devastavit* is fixed upon the principal, in a previous suit, against him, except in cases where from some *inevitable necessity*, a creditor is obliged to come into equity, in the first instance, against the *principal*; & then, to prevent a circuity of actions, the securities should be made parties.

By the Court. There is nothing in this case which made it *necessary* for the plaintiff to bring his suit, in the first instance, in this court. It is a common case of an account for work and labor, upon which the remedy, *at law*, is plainly pointed out. Upon a recovery there, and the return of an execution, *no effects*, the plaintiff might have proceeded on, *for a devastavit*, or have brought his suit in equity, for a discovery of assets, as the case might be; but he has thought proper to begin in this court, 1. *to establish his demand*; 2. for an account of assets; 3. to be paid by the administrator; and, 4. if he should fail, then to be paid by the other defendants, who are *the securities* for the administration.

This is not the usual mode of proceeding....for, if, *in this case*, the court can entertain jurisdiction, there cannot be any cause that may not be brought in this court, if it be against an executor or administrator. The court clearly understands the law to be, that, before a *security* for an executor or administrator can be *sued at law*, *a devastavit* must be fixed upon the *principal*; and, if this be the case at law, why the same rule should not apply in this court, will not now be determined, as it is not necessary; but certainly there are cases where from some *inevitable necessity*, a creditor may be obliged to come into this court, in the first instance, against the *principal*, and, then, to prevent a circuity of actions, the *securities* should be made parties; but this is not one of them.

SEPTEMBER 1806.

BACHELDOR *against* ELLIOTT'S Adm'r. &c.

The authorities which have been cited to prove that the court has jurisdiction do not apply. They were all cases of legatees suing for their *legacies*, and asking a discovery of assets. Those were proper subjects for a court of equity; but the claim in this case is not; for although it be a good general rule, that when a court of equity has jurisdiction in part, it will entertain it for the whole, yet a party will not be allowed *merely* to suggest *a discovery*, or *an account* in his bill, to give the court jurisdiction, in order to deprive the other party of a trial at law, unless it should appear *indispensable* to the justice of his case; but this does not appear in the case now under consideration; on the contrary, it clearly appears that a discovery and an account of assets have been suggested as necessary, on purpose to avoid the proper court.

The orders, made in this cause, in May term, 1805, must be set aside, the plea allowed, and the bill dismissed with costs.

Thursday, 25th September.

ANDERSON *against* ANDERSON and others.

After a decision by the court of appeals remanding a cause to the court of chancery, new parties may be admitted.

In the distribution among creditors of the property of an insolvent debtor who is living, a creditor who has a *lien* on a *specific fund* and has obtained a decree against that fund, which proves insufficient,

AFTER the decision by the Court of Appeals, in the case of Tinsley against Anderson and others, reported in 3 Call, 329, (the cause having been remanded to the Court of Chancery, and an account directed to be taken by a Commissioner, according to the principles established by the Court of Appeals;---which, among other provisions, directed "that the remaining funds, if any, "should be distributed pro rata, among the several cre- "ditors who had no lien upon the lands,") Matthew Anderson and James Dabney filed their bills, stating that they had been always ready to contribute to the expense of the suit, and praying to be admitted to come into a dividend with the rest of the creditors. The cause now came on to be heard with respect to them, and upon the report of the Commissioner, to which the following exceptions were taken; 1. because a balance due under a decree of this court to Williamson's trustees had been allowed, the specific fund for the payment thereof being exhausted; and 2. because interest on the several claims was calculated up to the date of the report; the fund being insufficient to pay all the creditors, and moreover unproductive of continuing profits since it was sold.

By the Court. The claims of Matthew Anderson and James Dabney are to be admitted, in like manner as if

they had been exhibited before the appeal in this case. The claim of Williamson's trustees should hold the same rank as if no decree for the amount thereof had been rendered;—for no *lien* on the *general* fund could be established in its favor by the circumstance that the *specific* fund for the payment thereof under the said decree of foreclosure had been exhausted. Interest on the respective claims ought not to be allowed beyond the period when the proceeds of the sale of the lands in the proceedings mentioned came into the hands of the Commissioners who sold them.

The report therefore must be recommitted, that it may be reformed according to this opinion.

September 1806.

Anderson against Anderson &c.

does not thereby acquire any *lien* more than he had before upon the *general fund.*

Interest on the respective claims allowed only to the time when the proceeds of the sale of lands came into the hands of commissioners.

M'Call *against* Graham and Beall.

Saturday, 27th September.

THE defendants obtained a decree in the county court of Richmond against the complainant upon a second verdict found on the common law side of that court, in a suit in chancery, brought, under the peculiar circumstances of the case, to recover the mesne profits of an estate to which they were entitled, and which had been in the possession of the grandfather of the present complainant for many years. The decree was for the sum of £818 9*s.* 5*d.* An appeal was taken to this Court, and the decree affirmed—Upon an appeal to the Court of Appeals the decree of this court was affirmed; which decree of affirmance was entered in this court.

The complainant, at March term last, obtained leave of the court to file her bill of review, in which she states, among other things, 1. the errors which she supposes appear upon the face of the proceedings; 2. that the depositions read at law, upon the trial of the issue, were not with her consent or that of her counsel; and 3. that the evidence now produced has come to her knowledge since the trial at law of the issue in the county court, and of which she was not then informed; which reasons she alledged were sufficient for this court to reverse the former decree. The court, upon receiving the bill of review, awarded a supersedeas; and now a motion was made for its discharge.

Where a decree has been affirmed by the court of appeals, a bill of review ought not to be granted to reverse it for any errors on the face of the proceedings, but if new matter is produced, *which was unknown to the party applying at the time of the decree,* this court may, and, if the evidence warrants it, ought to grant such bill of review.

Where an issue is direct-

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M'CALL against GRAHAM, &c.

ed by the court of chancery to be tried at law, any papers may be read at the trial of such issue, which were read upon the hearing of the cause, or at a former trial.

By the Court. So much of the bill of review as seeks a reversal of the decree, for the errors complained of in the proceedings which have been before the Court of Appeals, this court must reject; because it has no power to revise the decisions of that court; neither ought it to have any such power, for it would lead to endless litigation. If there was any doubt about it, the case of *White* against *Atkinson*, 2 Call, 378, would be clear authority against it: but it is one of those cases which admit of no doubt: and if, when the bill was offered, it had been sent to a master with orders to strike out all impertinent matter, the little that would have remained would clearly have shewn that it ought not to have been received. The affidavits of James Webb and Joseph J. Monroe are relied upon to shew that the depositions, read upon the trial of the issue, at law, were not read by their consent as counsel for the present complainant; and the affidavit of Francis T. Brooke is also relied on to shew, that he has no recollection of having given his consent, at the time, when he was counsel, previous to the last trial, but is pretty certain he did not. But it is not at all material whether those gentlemen did give their consent, or not, since it appears, from the testimony of John Monroe, stated in the record, and which is not denied at this time by any evidence before us, that those depositions had been read on a former trial, and therefore the court thinks that they should have been read on the trial at which they were objected to. And this for another reason. The law is, that, in chancery cases in the county courts, the same shall conform to the practice of the high Court of Chancery in like cases (Rev. Code, p. 92, sec. 69;) and a rule then existing of the high Court of Chancery authorised the reading upon the trial of an issue of any papers which had been read upon the hearing of the cause; and therefore the case, as it stood before the county court of Richmond, being, under the above recited act, within the rule of a like case in the High Court of Chancery, was properly submitted to the jury upon the evidence objected to. But, if it was necessary for the court to rest the decision of this part of the cause upon the comparison of testimony, it is believed it might be shewn without difficulty, that the testimony *now* offered does not conflict with that which was given by John Monroe on the trial. The rest of the testimony relates to the land, the injury done to which was the subject of the verdict, which produced the de-

cree now sought to be reversed. And the question, upon this evidence, is, should it vary the verdict?

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M'Cale *against* Graham, &c.

The rule is, that a bill of review may be brought upon *error* of law appearing in the body of the decree itself, or upon discovery of new matter. Under the former part of this rule, for reasons already assigned, this court is clearly without any power to act upon the subject; but, under the latter part of the rule, it may; and, if the evidence will warrant it, should act. But how has the complainant brought herself within the rule upon discovery of new matter; which will not be sufficient, unless it shall satisfactorily appear, that such new matter could not be produced or used by the party claiming the benefit of it, at the time when the decree was made? *Mitford's Pleadings*, 78, 79. For, if the testimony now produced to shew new matter could have been produced when the decree in the county court was entered, the party by whom it is now introduced shall not have the benefit of it, because such conduct would tend to occasion endless litigation also; and because, too, no one shall avail himself of his own negligence. The court is clearly of opinion that the evidence *now* offered ought not to vary the former decree, entered upon the verdict of the jury who tried the issue directed at law: 1. because it is not produced within the rule as laid down; for the same or similar evidence must have been in the knowledge of the party then; and, if such evidence might then have been used, that which is now introduced is not such as discloses new matter; and, 2. if it had been properly produced, being nevertheless insufficient, it should not have the effect contended for. In any view, therefore, which this court can take of the cause, it is clearly of opinion, that, as the bill of review ought not to have been received, the supersedeas ought now to be discharged.

From this decision the complainant, by *Mr. Warden*, her counsel, prayed an appeal, under the act enlarging the right of appeals in certain cases, (Revised Code, p. 375,) which the court refused.

Wilson *against* Wilson's Adm'rs. & others.

Tuesday, 30th September.

Executors & administrators, having

THE complainant, living in Great Britain, by his bill, stated himself to be a considerable creditor of the intestate of two of the defendants. The intestate lived and

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WILSON *against* WILSON's Adm'rs &c.

died in the District of Columbia, and administration of his goods and chattels in that District was granted to two of the defendants, who also reside there. Administration of the goods and chattels of the intestate being in this commonwealth, was also granted to the same defendants in one of the county courts in Virginia. Sundry debts due to the intestate, some in the District of Columbia and others in this commonwealth, were attached in the hands of the other defendants to satisfy the complainant's demand.

given security for their administration, are not to be required to give security on obtaining injunctions, appeals, writs of error or supersedeas.

The defendants, the administrators, having filed their answers, now moved to discharge the attachment against the other defendants *without security*;

1. Upon the ground that suits for the same matters and things are brought and now depending in the District of Columbia;

Where debts due to a person dec'd are attached by his creditor, in chancery, his executors or administrators may appear, file their answers and have the attachment discharged on their motion, without giving security.

2. That part of the debts attached are due in Columbia from persons residing there, and therefore the attachments should be discharged as to those debts, the debtors not being amenable to the process of this court; and,

3. That as administrators they have already given security, and are not bound to give any now.

By the Court. A decision of the last point will be sufficient at present. There can be no doubt but, if an executor or administrator obtains an injunction, an appeal, writ of error or supersedeas, he is not ruled to give security, except in cases where a judgment for a devastavit, has been obtained against him; and, if, he is sued, he is not ruled to give bail; because he represents the estate of a deceased person, for the faithful administration of which he has already given security, and if, in prosecuting or defending any suit for or against his testator or intestate, as the case may be, he does that which in law is injurious to a creditor, the securities for his administration are liable; and, because too, if you compel him to give security in those cases, in order that he may be enabled to do justice to his testator's or intestate's estate, you compel him to make the debt his own, although he should be guilty of no improper act. It is the usual course of the country....it is every day's practice in all our courts of law and equity to allow an executor or administrator, who stands in right of another, to prosecute or defend himself without secu-

3 Bac. abr. 6th edition. by Gwillim p. 101.

rity. And why should he not in a case like the present? It is contended by the complainant's counsel, that the administrators should give security, because the words of the statute, Rev. Code, p. 115, sec. 2 and 3, are general, and make no exception as to executors or administrators. But though the words of this statute be general, they are not more so, than the words of the statute relative to an injunction, in the same book, p. 68, sec. 55, 56; nor are they more so than the statute concerning appeals, writs of error, or supersedeas....ib. p. 82, sec. 56. Yet, in all those cases, the rule has prevailed, that executors or administrators may obtain an injunction, an appeal, a writ of error or supersedeas without security, upon this plain construction of the statutes before mentioned, that, though their words be general, they can only be applied to those persons who stand upon their own rights, and shall not be allowed to delay others, until they have done that which executors and administrators have done, that is to say, given security. If this be a sound exposition of these statutes, such must also be the construction of the one under consideration; and therefore, no good reason can be given to prevent the two defendants who are administrators, from having the attachments in this case discharged without other security than that which they have given for their administration. To say that the attachments shall continue, notwithstanding the defendants have entered their appearance and filed their answer, may be to compel those defendants to commit a devastavit, an act, which, under certain circumstances, that sometimes occur, this court would lend its aid to prevent, but will not be the means of producing.

But the counsel for the complainant has assimilated this case to that of a *ne exeat*. At first there did appear to be some force in the observation, but, upon examination, the court is satisfied that the analogy fails. To require of the administrators, in this case, security, before they shall be allowed to have the attachments discharged, whereby they would be enabled to collect the debts of their intestate, would be to require of them, whether they have assets or not, bond with security to perform the ultimate decree of the court: but *this* would not be required of them, if they were under a *ne exeat*, issued from this court, in their present characters; but only security that they should not depart from this commonwealth, until they should account for the assets in their hands. This would not be an un-

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reasonable request, because the moment they did so, the *ne exeat* would be discharged, *without security to perform the final decree.* However, upon this particular point, the court is only to be understood as reasoning by analogy, and not determining any thing with respect to it.

Upon the whole, the court is clearly of opinon, that the attachments should be discharged, at the instance of the administrators, without security, it appearing to the entire satisfaction of the court, that they have given security for their administration in the county court of Fairfax. The attachments were thereupon discharged, and an account directed at the request of the complainant.

Thursday, 2d October.

HARRIS *against* THOMAS.

An injunction to stay waste is generally a proper subject for the jurisdiction of a court of equity, notwithstanding an act of assembly gives a remedy at law.

THE complainant had obtained a verdict at law in the District Court of Charlottesville, in an action of trespass, brought to try the title of land. As soon as the judgment was rendered, the defendant began to commit waste on the land which had been the subject of controversy, to restrain which waste, an injunction was awarded by this court. The defendant by his answer, did not except to the jurisdiction of the court, but relied upon his title, notwithstanding the judgment at law. A motion was now made to dissolve the injunction.

When any objection to a bill is apparent on its face, it may be demurred to, but when not apparent on the bill itself, the proper mode of defence is by plea or answer.

By the Court. The bill presents a case proper for the consideration of a Court of Equity. If it did not, the exception now taken at the bar might possibly be sustained, notwithstanding the 29th sec. of the act by which this court was established, (Revised Code, p. 66,) the true exposition of which may *possibly* be confined to those cases where the jurisdiction of a Court of Equity must be excepted to *by plea in abatement, and not by demurrer;* for the rule is laid down by the English authorities to be, that when any objection is apparent on the bill itself, either from matter contained in it, or from some defect in its frame, or in the case made by it, such objection should be made by demurrer as the proper mode of defence; but when an objection is not apparent on the bill itself, (as is the case in the present instance,) the proper mode of defence is by plea or answer, shewing to the court the matter which creates the objection; and this is generally done by a plea in abatement to the jurisdiction. See Mitford's Pleadings, p. 177. It may be proper for the above recit-

ed act to bear this construction, to prevent too many impositions upon the jurisdiction of this court: at present, however, the court will leave this question open for future discussion, without saying what would be the decision, if the jurisdiction had been properly excepted to: for, if the statute concerning waste, (Revised Code, p. 277, sec. 8,) had been considered, it would have clearly appeared that a court of common law has the power, pending any suit concerning land, to prevent the party in possession from committing waste.

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HARRIS *against* THOMAS.

But the suit having been commenced here for that purpose, and that being one of the subjects which this court may enquire into and determine upon, unless, under some peculiar circumstances, it could be shewn to be more properly cognizable in a court of common law, this court, upon the general principle that, where it has jurisdiction in part, it will entertain it for the whole subject of controversy, since the parties are before it, will now do so: and, as it depends upon the *title* whether the complainant has committed the waste complained of, or not, an issue will be directed, at law, to try the title; and until the verdict of the jury thereupon, shall be certified, the injunction will stand continued.

A Rule of the Court of Chancery.

7th October.

THIS being the last day of the term, the injunctions dissolved at the last term were all called over, (under the rule of the court, in pursuance of the act of assembly, passed at the December session, 1803,) to be dismissed, unless good cause to the contrary should be shewn: when the court said, that, if any gentleman of the bar, who desired to continue his suit, where the injunction had been dissolved, would state that his client had additional evidence, or could procure it, which would, in the opinion of such counsel, vary the case, it might be continued as an original suit, for a final hearing upon the merits.

JUDGES

OF THE

COURT OF APPEALS,

DURING THE PERIOD OF THESE REPORTS.

PETER LYONS, Esquire, *President.*
PAUL CARRINGTON, Esquire.
WILLIAM FLEMING, Esquire.
SPENCER ROANE, Esquire.
St. GEORGE TUCKER, Esquire.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA:

In the THIRTY-FIRST YEAR of the COMMONWEALTH.

*Friday, 10th October, 1806.**

ROBERTSON *against* BRADDICK.

An appeal may be determined in a district court, at the term to which the record is bro't up.

The appellee has a right to bring up the record.

THIS was an appeal from the District Court of *Petersburg*. *Braddick* had obtained a judgment against *Robertson* on a forthcoming bond, in the county court of Amelia; from which the latter appealed to the District Court, where, the cause being called in its turn on the docket, the counsel for the appellee opened the record, and moved for an affirmance of the judgment, in which there was no error. The counsel for the appellant objected to the court's hearing the cause at that time, alledging that the record had been brought up to *that court only, and by the appellee*. But this objection was over-ruled by the District Court, and on an appeal to this court, the judgment was affirmed.

Present Judges *Lyons*, *Carrington* and *Tucker*.

* *Judge Fleming* was absent from the commencement of this term, till the 4th of November, having been prevented from attending by indisposition.

Saturday, 11th October.

NELSON *against* MATTHEWS.

After two terms of this court have elapsed since the appeal, and before the record is brought up, a judgment cannot be affirmed; but the appeal may be dismissed with costs.

TWO terms of this court having elapsed since the appeal was granted by the District Court in this case, *Chapman Johnson*, for the appellee, moved that it should now be

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Nelson against Matthews

docketted, and the judgment affirmed, it being *a case for delay*. The court (consisting of Judges Lyons, Carrington and Tucker) upon the authority of the case of *Mills* against *Black*, 1 Call, 241, decided that the judgment could not be affirmed; but dismissed the appeal with costs.

Saturday, 11th October.

Lee *against* Frame.

Notice ought to be given of an intention to take up an appeal at the first term of this court in a chancery case.

THIS was an appeal from a decree of the Chancery District Court, held at Staunton, by which a bill of injunction was dismissed with costs.

Chapman Johnson, for the appellee, moved the court to admit the appeal to be docketted, and to affirm the decree immediately, alledging it to be a case for delay.

It is the practice of the court to take up new appeals from judgments in plain cases, at the first term, but not from decrees in chancery.

Judges Lyons and Carrington were of opinion that notice ought to be given of an intention to take up an appeal at the first term in a chancery case; that it was, indeed, the practice of the court, in cases of appeals from judgments obtained on forthcoming bonds, and in other cases where there is no dispute, to examine the records at the term to which they were brought up, but not in *Chancery Cases*.

Judge Tucker. The practice of the court being founded on the principle that, where the appellant had already, for the sake of delay, taken every advantage allowed by the law, no farther procrastination should be permitted here, the rule ought therefore to be extended to cases of *injunction*, in which the complainant has generally obtained delay by more unjustifiable means than in other cases.... of course, I am of opinion that the appeal ought to be taken up immediately.

But, the majority of the court being of a different opinion, the appeal was docketted, and the motion to take it up over-ruled.

Monday, 13th October.

Dunlops *against* Laporte.

If the plaintiff does not, in the first instance, except to the

THIS was a motion for a writ of supersedeas to a judgment of the District Court of Staunton. The following appeared to have been the proceedings in the cause. The capias having been returned in an action of

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DUNLOPE *against* LAPORTE.

debt "executed on the defendant, and Lewis A. Pauly "appearance bail;" at the rules, in January, 1806, a common order was entered against them, which, in February, 1806, was confirmed. At the ensuing April term the appearance bail defended the suit, filed the plea of "payment by the principal," and set aside the office judgment. At September term 1806, the defendant appeared, offered *Lewis A. Pauly* as special bail, and moved to be permitted to plead. The plaintiff's counsel objected to the admission of Pauly as special bail, on the ground that no proof was exhibited of his sufficiency: but the court over-ruled the objection, because the plaintiffs had not excepted to him as appearance bail, and therefore were bound to receive him as special bail. Pauly was thereupon permitted to withdraw his plea, and the defendant to plead. He pleaded payment, and the cause was tried at the same term. The plaintiffs filed a bill of exceptions to the opinion of the court.

If the appearance bail omit to except to the sufficiency of the appearance bail, he cannot afterwards object to receiving him as special bail.

After the appearance bail has defended the suit and pleaded, the defendant may, at a subsequent term, be admitted to appear, give as special bail the same person who was appearance bail, file a plea and go to trial.

The petition for a supersedeas stated two points; 1. that Lewis A. Pauly ought not to have been admitted as special bail, because he was not known to be good; 2. that at the term after the office judgment had been set aside by a plea filed by the appearance bail, and an issue made up between him and the plaintiff, the court had no power to receive special bail, and set aside that issue.

Chapman Johnson, in support of the 1st point, relied on the language of the act of assembly, by which the defendant is allowed to set aside the office judgment upon appearing and giving *good* special bail, and alledged that the failure to except to Pauly as appearance bail was no evidence of his being good as special bail. That failure, he contended, might have been the result of inadvertence, or of a choice rather to risque his sufficiency than to delay the cause by sending it back to the rules, after he should have been adjudged insufficient. Besides, if it was proven that he was good appearance bail, he might, since he was received as such, have become insolvent.

In support of the 2d point, he observed that, when an office judgment has been confirmed, the act of assembly has provided but two means of setting it aside; the one by the defendant's own appearance and compliance with the requisites of the law at the ensuing court; the other by the act of the appearance bail, who may defend the suit; that, therefore, unless one of these two things be done *at the term succeeding the confirmation of the office*

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judgment at the rules, it remains absolute against principal and bail, and neither of them can at any subsequent time claim the right of defending the action.

Wickham, *contra*. The setting aside of an office judgment is discretionary with the court. The terms of the act of assembly are *permissive* only, viz. that, on complying therewith, an office judgment *may* be set aside; not *prohibitory*, so as to prevent its being set aside, for good cause shewn, even after the term assigned for that purpose has elapsed. The admission of special bail, in that stage of the business is therefore entirely discretionary, and, as far as my observation has extended, it has been uniformly allowed in order to promote the justice of the case. The mere circumstance of receiving a person as appearance bail entitles him to enter himself special bail; for, if the plaintiff had objected to his sufficiency, he had only to have entered his objection, and taken a common order against the sheriff: his not having done so is a declaration to the defendant that he need not look out for special bail. The practice of the old General Court, which, on points of this nature, has generally been considered conclusive authority, was always conformable to these principles. And moreover, in the case of *Main, executor of Hyndman* against *Turnbull** decided in the Federal Court, the same doctrine was recognized. The attorney *there* had pleaded for the appearance bail, and, not two terms only, but several had elapsed, when the appearance bail was permitted to enter himself special bail. It is objected that the common bail cannot appear after the first term. To this I answer, that he may appear at any time, *if he does not delay a trial*; which was the case in the present instance, for the cause was tried at the same term at which the common bail was admitted as special bail, and the defendant allowed to plead.

The president delivered the opinion of the court, (consisting of himself and Judges Carrington and Tucker) that the supersedeas was refused without any difficulty.

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* It appears from an examination of the records of the Federal Court that the following were the proceedings in the case of *Main executor of Hyndman* against *Turnbull*, "July 1796, common order against the defendant, & William Cole his appearance bail: August, common order confirmed." At the November term, there was no court, in consequence of the non-attendance of the Judges "May term, 1797, payment by security and issue. November term ensuing, a jury was charged, but not agreeing on a verdict, one of the jurors was withdrawn. Nov. term, 1798 *William Cole the appearance bail* was admitted special bail, and the cause tried the same term."

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HALLEY's Adm'r. *against* BAIRD and YOUNG.

Monday, 13th October.

No inferior court of common law has the power of reversing, altering or amending its own judgments after the term at which they were entered.

Quaere. Where a cause is removed by habeas corpus from an inferior to a superior court, whether the proceedings ought to be commenced *de novo*, or carried on from the stage at which they stood in the inferior court?

HALLEY brought an action of debt against *Baird* in the Hustings Court of Petersburg. After an office judgment was confirmed against the defendant and two others, his appearance bail, they became special bail; surrendered their principal to the sergeant of the town, who certified that his body was actually in his custody, having been surrendered by the special bail; a writ of *habeas corpus* was thereupon issued from the clerk's office of the District Court of Petersburg, for the removal of the cause to that court; upon which writ the sergeant returned that the defendant was released from his custody, after the receipt of the precept by giving the bail returned therewith, for his appearance at the District Court, (the same bail in the Hustings Court having again entered special bail for the defendant, in the suit as it stood removed to, and was depending in the District Court.) These proceedings were had between the confirmation of the office judgment at the rules held in the clerk's office in June, and the quarterly sessions in August, 1800, to which the writ of *habeas corpus* was produced. At the first term of the District Court, after the suit was removed, (September, 1800,) final judgment was entered up against the defendant, as upon an office judgment not set aside during the term. Upon an execution issued on this judgment, a forthcoming bond was taken; which, being forfeited, a notice was given to the September term of the District Court, 1801, for a judgment and award of execution thereupon. But the District Court over-ruled the motion to that effect, and directed, that "all the proceedings had subsequent to the "return day of the writ of *habeas corpus*, be set aside, and "the suit sent to the rules for further proceedings to be "had thereon." For errors assigned in this judgment, a supersedeas was awarded by this court.

Randolph, for the plaintiff in error, admitted that a *habeas corpus* being in the nature of a writ of right, might be awarded, after a cause had progressed to an office judgment; but contended, that after its removal to the superior court, it should be there proceeded on from the stage in which it stood in the inferior court. The practice in England, of commencing *de novo* (*a*) has no weight or authority in

(*a*) 14 Vin. 226. 1 Salk. 332.

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HALLEY'S Adm'r. *against* BAIRD, &c.

this state; because *there* nothing is transmitted but the names of the parties,....*here* the record is as much removed as upon a *certiorari*, &c. Precedents in England, applying to points of practice have never been regarded by this court (*b*) unless they have been established so as to become a rule of property. Our act of assembly (R. Code, Pleast. edit. pa. 216, 217) allows certain fees to clerks for making up complete records upon writs of *habeas corpus*, &c. By the District Court law, (same book, pa. 77) the clerk is to certify the cause of commitment; which can only be done by certifying the whole proceedings in the cause, not a mere note of the names of the parties, as in England.

(*b*) See 1. Wash. 10. Ibid 302.

There was another point in this cause, viz. that after a judgment, an execution, and a forthcoming bond taken thereupon, the District Court, at a subsequent term had undertaken to set the judgment aside, when their power over it had ceased. (See the decision of the court in the case of *Vaughn*, &c. against *Freeland*, &c. in May last.) This he considered conclusive for his client; but he wished the practice settled on the other point.

Curia advisare vult.

Thursday, October 16th. The president delivered the opinion of the court, That there was error in this, that the District Court had no power or jurisdiction to reverse, alter or amend the judgment given at a former term of the said court, which had been entered on the order book, and signed by a Judge in open court, or to quash the proceedings in the said suit prior to the said judgment, but ought to have given judgment on the forthcoming bond taken upon the execution which issued upon the former judgment, and was forfeited. Judgment reversed, with costs, and new judgment on the forthcoming bond, as usual, according to law, &c.

Present, Judges *Lyons*, *Carrington* and *Tucker*.

Monday, 13th October.

SADLER'S Executors and Legatees *against* GREEN.

Where executors and legatees jointly appeal, the legatees (being

ON an appeal from the Williamsburg Chancery District Court.

In this case the appellee obtained an interlocutory decree for some negroes, then being in the possession of the legatees, and for an account of their profits. From this

decree an appeal was taken, more than two years ago, to this court, both by the executors and legatees, but no security given.

Wickham, for the appellee, moved to abate the suit as to the executors, (who were dead,) and to dismiss the appeal as to the legatees. Altho' he admitted that no security on the appeal could be required of the executors in this case, yet, as the legatees, who were in possession of the negroes, had likewise appealed, *they* certainly ought to have given security.

Hay, on the other side, objected to taking up the subject, after such a lapse of time since the appeal, without notice of the intended application.

By the Court. The appellee has suffered two years to elapse without making any application to the court respecting the security to the appeal. It would not now be proper to rule the appellants to security without notice. Let a rule be made on the legatees returnable to the next term, to shew cause why security should not be given.

Afterwards, Thursday, Oct. 16th, *Hay* submitted a question to the court, whether the appeal as to the legatees would be dismissed, if they did not give security?

By the Court....(absent Judge *Fleming*.) Executors and administrators are not bound to give security on an appeal, because they give it, when they undertake the administration of the estate of their testator or intestate. But the legatees, in this case, being in possession of the property, which is personal, are bound to give security for the prosecution of the appeal, or it will be dismissed as to them.

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SARLES'S EX'ORS. &c. *against* GREEN.

In possession of the property in dispute) may be ruled to give security for the prosecution of the appeal.

CHISHOLM *against* ANTHONY.

Tuesday, 14th October.

ANTHONY brought an action of debt against *Walter Chisholm*, administrator of *John Chisholm*, dec'd in the county court of Louisa;....at the November term 1800, the defendant pleaded *payment*,* upon which issue was joined;....at March term following, he moved the court for leave "to amend his plea, and plead *fully administered*, and to continue the cause till the next term," which

An ex'or or adm'r ought to be permitted, on his motion, tho' not attended with an affidavit, to amend his plea by pleading *plene administravit*, at any time before the trial

* It would seem from the record, that the plea of *payment* was put in the same term at which the declaration was filed; no notice having been taken of any prior steps at the rules and the declaration and plea being both entered on the record as of the November term.

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CHISHOLM *against* ANTHONY.

motion *for a continuance** was over-ruled by the court; and the cause being tried at the same term on the plea of payment, a verdict and judgment was rendered for the plaintiff, to be levied of the goods and chattels of the intestate. From this judgment an appeal was taken to the District Court of Charlottesville, where it was, in all things, affirmed. To correct which judgment a supersedeas was awarded by this court.

of a suit against him, provided the court are satisfied that the motion is not made merely for the sake of delay.

Stuart, for the plaintiff in error, cited the case of *Cooke* against *Beale's* executors, (1 Wash. 313) to prove that the Court of Appeals will judge whether an inferior court has exercised a sound discretion. In the present case, there was a peculiar necessity to ask the permission to amend the plea, as the defendant was an administrator, and it may be presumed, was at first unacquainted with the state of the decedent's affairs. It may be objected that he ought to have filed an affidavit; but this was not called for. This court ought to countenance a doctrine, which would prevent the necessity of applying to a court of equity. Executors and administrators are subjected to perils enough, and ought for that reason to be favored by the court.

Wickham, on the other side, did not doubt the right of the court to judge of the discretion which ought to govern inferior courts; but in this case, he contended, the discretion had been soundly exercised. No affidavit was filed by the defendant. The new plea would have occasioned a continuance; the effect of which practice would be, by a side wind, to continue a cause at the pleasure of the party; for there was no proof that the plea was true; it might have been relinquished at the next court; and in such a case, an executor or administrator might, after all, go into chancery.

Judge Lyons. Would a Court of Chancery relieve in such a case?

Wickham. The doctrine has been repeatedly recognized in the Courts of Chancery in this country, and in this court.

It is said an executor might not have known, at first, the amount of assets, and the demands against the estate of his testator, but might have made the discovery afterwards. This might be so, or it might not be so. The court were not to instruct the plaintiff's attorney that an

* So stated in the record.

affidavit was necessary. Executors are not entitled to favor, but only to justice.

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Stuart in reply. The application to the court was twofold; *first*, to amend the plea, and *secondly*, for a continuance of the cause. The court ought to have granted leave to amend the plea, and if they had thought it proper, might have denied the continuance. If a court of law can give relief, the parties ought not to be driven into a court of equity.

Curia advisare vult.

Wednesday, 15th October. The president delivered the opinion of the court....(absent Judge *Fleming*.) That the county court erred in not permitting the defendant to amend his plea, by pleading fully administered, according to his motion. Judgment reversed with costs, and the suit remitted, with instructions to admit of the amendment, &c.

MOORE'S Ex'or. *against* WM. AYLETT'S Ex'or. and PHILIP AYLETT.

Tuesday, 14th October.

THIS was a revived appeal from a decree of the Richmond Chancery District Court, in a suit brought by the appellees against the appellant's testator.

If it is agreed between a mortgagor & mortgagee, that, in case the debt is not paid, the mortgagee may sell the property, &, in consequence thereof, he sells, without proof of fraud, he is accountable to the mortgagor for the surplus of the sum for which he sells above the amount of the debt, with interest on such surplus until

The bill states that certain negroes belonging to the estate of *William Aylett*, deceased, being about to be sold to satisfy an execution, *Philip Aylett*, who acted for the executor, requested *Bernard Moore* to lend him the sum which was wanting to discharge the execution; that *Moore* agreed to do so, upon condition that Mary, one of the slaves, who was then with child, and had also a child in her arms, should be set up, and purchased by him; that he should hold the said slaves as a security for some time, but, if the money was not paid in a convenient time, should be authorized to sell them for the best price that could be got, and, after repaying himself, to restore the surplus to the said *Aylett*; that *Philip Aylett* agreed to this proposal, and the slaves were set up and purchased by *Moore*, upon those terms expressly declared by himself; the sum advanced being far less than their value; that these transactions took place in July, 1791; and, in February following, the plaintiff, *Aylett*, sent an offer of the money borrowed to the said *Moore*, and desired him to

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restore the slaves, which he refused to do, and hath since sold them at a considerable advance, and peremptorily refuses any part of the money to the plaintiff, who therefore prays relief.

The answer of *Moore* admits the purchase for £34 10*s* 5*d*, and the terms, except that he alledges he was to restore the slaves, in case the money with interest, was repaid, in eight or ten weeks; that he permitted them to return home after the sale, where they stayed eight or ten weeks, at the end of which time, seeing no prospect of the money being paid, he sent for them to his own house, where they remained twelve months, and then were sold to James Hill for 50*l*;---that the negro woman, while she was in his possession, was delivered of a child, and was a mere burthen to him; that he believes *Philip Aylett* did, four or five months after the sale, write to him, and offer to take the negroes back, but he saw no money, and none was ever tendered to him.

payment; but not for *profits*, unless he appears to have received them previous to the sale, nor for the value of the property at any subsequent time.

The depositions of *Thomas Gary* and *Benjamin Temple*, in substance, correspond with the allegations in the bill.

The Chancellor, on the 28th of September, 1799, decreed "that the defendant, unless he restore to the plaintiff Claiborne, the slaves aforesaid, and the children, "since born of the mother, upon receiving principal sum "(borrowed) and interest due thereon, or so much thereof as shall exceed the mother's profits, do pay unto the "plaintiff the value of the said slaves over the said principal and interest; and directed the said slaves to be estimated by a jury, to be impanelled and charged before "the District Court of King and Queen, and their verdict "thereon to be certified to the court. In case the defendant should restore the slaves; and profits of the mother "be claimed; for ascertaining them, liberty to resort to "the court, was reserved to the parties."

The jury assessed the value of the slave Mary, at the time of their verdict at £50, and that of her child at £30, and said there were no profits of the said slaves, since they were pledged. On the 12th of May, 1801, the chancellor decreed "that the defendant do pay unto the plaintiff 45*l* 9*s* 9*d*," (being the difference between 34*l* 10*s* 3*d*, the money lent, and 80*l* the value fixed on the negroes by the jury,) "with interest thereon at the rate of five per centum per annum, from July, 1792, and the costs."

Bernard Moore applied to the Court of Appeals for an appeal from that decree, which was allowed him. In his

petition for an appeal he insisted on the following errors in the decree;

1. That interest had not been allowed him on the money lent;

2. That interest had been allowed to the executor on the balance of the value of the negroes as fixed by the jury after deducting the sum lent, although the answer denied the money had ever been tendered, and the jury expressly found that there were no profits of the slaves;

3. That interest, if properly allowable to the said executor, ought not to have been allowed from 1792 *upon the present value.*

Nicholas, for the appellant, also contended, 4. That, if the slaves were pledged to *Moore*, all the appellees can rightfully claim is the balance of the 50*l*, for which *Moore* sold the slaves, after deducting the sum loaned; with interest on that balance from the time of the sale to Hill.

Warden, for the appellees, made three points;

1. That the verdict was imperfect, as not being a direct answer to the question, which the order required to be answered by the jury, and therefore an improper ground for a decree; having estimated only the values of Mary, and one of her children, instead of estimating her value, ...that of her son who was nineteen months old in July, 1791,....and the values of all her children born after that period,....and without saying, that she had no after born child, and that he was the child valued.

2. That even if Mary had borne no child after the purchase of her by *Moore*, and she only and her child, then near two years old, had been valued, their valuations were evidently so far below the price which they would have brought, that the verdict ought to have been rejected on that account.

3. That the sale, by the appellant, of Mary and her two children, (for the answer admits that she had a second child before that sale,) within eight months after his receiving them as a pledge for the money lent, and without any demand thereof, was such a wrong, as ought to have deprived him of all interest, and also to have exposed him to the payment of damages.

On this point he insisted that *Moore* ought to have offered to return the negroes, and demanded his principal and interest to be paid him. The payment was to have been made in convenient time. Had *Moore* a right to judge of that time? *Moore* had the use of the slaves,

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which ought to be set against the interest of his money, until he sold them; and, from that time, interest was properly allowed the executor on the surplus, because he then had the use of the *money*, which was not burthensome to him, tho' the negroes are pretended to have been so. He cited here the case of *Hooper* against *Shepard*, 2 Strange 1039. The decree was right, so far as respected the interest; but the error was, that, instead of giving the appellees too much, it gave them too little, in consequence of the omission in the verdict. It ought therefore to be reversed, and a new valuation of the slaves directed.

Nicholas in reply. With respect to the value of the slaves, the jury were competent to decide, and this court cannot say that they decided improperly. Mr. *Warden*, in endeavoring to set aside the decree, is laboring to destroy that under which he claims. He made no objection in the Court of Chancery to the verdict, but took the decree as it stands. As to the children of Mary born after the sale made by *Moore*; unless it can be shewn that he had no right to sell the slaves, their issue belongs to the person to whom he sold them, not to himself; and therefore he should not be responsible for them. This court ought to presume, as to any other children of Mary, that there were none such, as the appellees took their decree, without objecting that any were omitted in the verdict.

Curia advisare vult.

Wednesday, Oct. 15th. The president delivered the opinion of the court that the decree be reversed, and the costs of the appeal be paid by the appellees; and, this court proceeding to make such decree as the said High Court of Chancery ought to have pronounced, it was further decreed that the appellant pay to the appellee executor of *Wm. Aylett* the sum of £13 7*s*. 0*d*. (which appears to be the difference between the amount of the money lent with the interest due thereon at the time when *Bernard Moore* sold the slaves, and £50, the sum for which he sold them,) with interest from the first day of October, 1792, until payment, and the costs in the said Court of Chancery.

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THE only point of importance, on which the court decided, was, whether the maxim "*in pari delicto fiotior est conditio defendentis*," that is, "*where both parties are equally guilty, the defendant shall prevail*," applied in this case.*

Where a transaction between a debtor & his creditor is intended by them both to defraud the other creditors of the debtor, but the latter, under all the circumstances of the case, is not so culpable as the former, *it would seem* that a court of equity ought not altogether to refuse relief to the debtor, but to apportion the relief granted to the degree of criminality in both parties, so as, on the one hand, to avoid the encouragement of fraud, and on the other to prevent extortion and oppression.

In the opinions delivered by the Judges, the substance of the case is so fully stated, and the decree of the High Court of Chancery (from which this was an appeal) so accurately given, that it would unnecessarily increase the size of the volume to make any other statement here.

The arguments of counsel, (*Randolph*, *Warden* and *Duval* for the appellant, and *Wickham* for the appellee,) having turned very much on the evidence, and the authorities cited by them, having been fully discussed by the Judges, we conceive that the insertion of those arguments would be productive of needless repetitions, and therefore omit them.

On Monday, October 27th, the Judges delivered their opinions.

Judge TUCKER.—This case, as stated in the bill, and as it appears from the evidence, appears to be in substance this....

William Winston being bound to Chapman Austin in a twelve months' replevy bond, for £198 6*s*, of which about £38 had been discharged, when the bond became due, was applied to by Austin for the balance; but not being able to pay it, asked for some further indulgence, as he proposed selling some lands for the purpose of discharging all his debts; or, if he could not sell his lands, he would sell a part of his negroes, and discharge his debt to Austin. Austin observed, that, if he sold his lands for cash, they would not sell for near their value; therefore, he had better sell his negroes at once; for if he did not sell them, they would be sold very shortly to discharge the debts of his brother Geddis Winston, whose security he was, as high sheriff, and in other instances; and that

* See the cases of *Clarke* vs. *Shee* and *Johnston*, Cowp. 197, and *Browning* vs. *Morris*, Ibid 790; also *Smith* vs. *Bromley*, cited in *Jones* vs. *Bartley*—Doug. 696.

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he also knew his brother had sold and made over all his property to his children, and was worth nothing--and that it was his advice to keep his land, *as it was not liable for debt*, and sell a part of his negroes to discharge his just debts, and make the rest over to his children as his brother had done:...and finally proposed that his negroes should be sold under an execution for his debt, in lots, so that they might sell for little or nothing, and get some person to buy them in for him: and that he, if Winston thought proper, would become the purchaser, and would make the negroes over to his children, as soon as Winston should pay him his debt with interest. To this overture, Winston lent a willing ear, and assented to it. It was then agreed that Winston and his family should not let it be known that Austin was to purchase in the negroes *for him*; but to tell every person that should make enquiry that his negroes would certainly be sold: that Winston, on the day of sale, should proclaim to the people that the sale was a fair one, and, after the sale was over, he must apply to Austin to lend him the negroes to finish his crop, *to keep the people at large* from thinking he bought in the negroes for him. To all which Winston agreed; and directed his wife (the plaintiff in the suit below) and his son Edward, from whose deposition this statement is made, not to tell any person of their plan; which, as far as it depended on Winston, was carried into execution at the sale, with the most scrupulous exactness; with this additional circumstance, that both he and Geddis Winston, on the same day, as it would seem, that this plan was adopted, wrote to the clerk of the court to issue the execution upon Austin's judgment which had now become final. This execution, it must be remembered, was irrepleviable, being upon a judgment on a replevin bond. The several depositions of Starke, the sheriff, Obadiah Faucett, Samuel Cross and Richard Littlepage, are in direct confirmation of Edward Winston's; and prove unequivocally that Winston most heartily co-operated with Austin in the proposed plan.

The sum and substance of this plan, or agreement, was to defraud the commonwealth, and all the other creditors of Winston, except Austin, under the pretext that the sale was a *bona fide* sale, made by a public officer, acting under the authority of the law, to satisfy a debt *bona fide* due from Winston to Austin. Seventeen negroes were thus sold in lots to satisfy a debt manifestly short of £200, upon the face of the execution, and actually reduced at

the time to about £160 only. The sale amounted to £207 15*s*, and was publicly made September 29th, 1789: and by an account stated between the parties it appears that three of the negroes were actually sold and conveyed back to Winston by Austin, for the same price he gave; and that the rest remained for a time in Winston's possession, under a pretence of hiring them till Christmas to finish his crop. But before that period Winston died; and Austin having got the negroes, or some of them into his possession, and sold a part of them, this bill was brought by the executors of Winston to redeem them, and to have those which are more than sufficient to pay the debt and interest returned, with an account of their profits, or their values, if the slaves themselves cannot be had. The Chancellor decreed accordingly....and a balance of £1109 5*s*. 8*d*. being found against Austin's estate by the commissioner's report, that report was confirmed:....the bill, as to the purchasers of the slaves from Austin, was dismissed.

I deem it unnecessary at present to enter any further into the particulars of this case, as my opinion will be founded upon this statement. If, however, that opinion should be over-ruled, it may be necessary to say something farther.

I have said that the sum and substance of the agreement between the parties was to defraud Winston's creditors of their just debts. Austin, it is true, proposed the fraud: but Winston, without whose concurrence Austin's fraud could never have taken effect, and whose creditors (and not *Austin's*) were to be defrauded by the contrivance, lent a willing ear and a ready co-operation to it. He, therefore, in point of moral guilt, was most culpable; for there was a moral obligation on *him* to pay his just debts:....there was no such moral obligation upon *Austin* to *pay*, though the obligation *not to defraud* was equally strong upon him as upon Winston. Austin, mean time, appears to have been a bona fide creditor of Winston's. From the moment that his judgment was consummate he had a legal lien on his lands also. The defendant could not *replevy* the slaves: they were, after the execution issued, in the custody of the law, and must have been sold, even for a tenth part of their value. Austin had a legal right to bid for the slaves, and, the moment they were struck out to him, the title was absolutely in him, as against Winston, both at law and equity; and, even against Winston's creditors, to the full amount of his own debt.

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The case is stronger in Austin's favor, upon these grounds, than any private conveyance from Winston could have made it: for what is done under the direction and authority of the law is more obligatory than any act of a party alone.

Now, an absolute deed between the parties, made with intent to defraud the creditors of the grantor, would be binding between the parties themselves, though merely void as to creditors, by our statute of frauds and perjuries. (L. V. 1794, c. 10.) Consequently, this sale made under the authority of the law, to satisfy a just debt, is equally binding between the *parties*, whatever may be the effect of the collusive agreement between them as to *creditors*.

It is a maxim at *law*, that where the parties are equally culpable, or criminal, the defendant must prevail; and in *equity*, that he that hath done *iniquity* shall not have *equity*; that is, he shall not have the aid of the court when he is *plaintiff*: which brings both maxims to the same point. And the maxim of the civil law, as cited 1 Fonb. 223 (Pacta quae contra leges et constitutiones, vel contra bonos mores sunt nullam vim habere indubitati Juris est. Dig. L. 2. T. 3. l. 6.)....The cases both at law and equity in support of this rule are numerous, and are referred to, Francis' Max. 2. 1 Fonb. 138 and 223....230. The case of Small *vs.* Blackley. 2 Vern. 602, which was a bill brought by a bankrupt to be relieved against a bond given to a particular creditor, who refused to sign and accept a composition for her debt to be paid as other creditors, unless the plaintiff would pay her £100 down, and three shillings in the pound over and above the composition, was finally dismissed by the Lord Chancellor, though a decree in his favor at the rolls. Parsons *vs.* Thompson, 1 Henry Bl. 322, and Garforth *vs.* Hearon, Ib. 327, are both decisions upon the same principle; viz. that any agreement which is contrary to the true policy of law, shall not not have the aid of a court to enforce it at law. The case of Sir Arthur Ingram, cited Co. Litt. 234. a. seems to have furnished the rule in the latter: and it is there said (H. Bl. 331) that courts of equity, in setting aside securities supposed to be valid at law, have gone by the same rule, as in the case of Juxton *vs.* Morris, those cited from Lord Nottingham's notes (and said to be mis-reported, 2 Ch. Cases 42,) and in Law *vs.* Law, 3 P. W. 392. Cocksheet *vs.* Bennett, was a decision at law, founded on the principle of law against the creditors of the party making the promissory note upon which the suit was brought.*

Vide. Middleton v. Ld. Onslow, 1 P. Williams 768.

* Vi. Jackson vs. Duchaire —3 T. R. 551, & Jackson vs. Lomas, 4 T. R. 166.

The case of Trueman *vs.* Fenton, Cowp. 544, may be thought an authority against the course of these decisions. In that case a bankrupt, after a commission of bankruptcy sued out, in consideration of a debt due before the bankruptcy, gave a note to his creditor for a part of his debt: and the court held, the creditor was entitled to recover; for the creditor did not prove his debt under the commission, but gave up two notes not yet due to the bankrupt, and took a note from the bankrupt payable at a future day for about half the sum: here was no fraud upon the creditors, for this creditor never did, nor, after accepting the security, in lieu of the two notes delivered up to be cancelled, ever could prove a debt against the bankrupt before his bankruptcy. The case of Walker *vs.* Perkins, 3 Burrow 1568, 1 Bl. Rep. 517, was upon a bond in consideration of the parties' having agreed to live together. And Mr. Blackstone, then at the bar, argued for the plaintiff that the setting aside such bonds was as much an encouragement to seduction in one sex, as establishing them would be in the other: and the same argument may be applied to the case before us. The court, in the case I have cited, decided, however, in favor of the defendant; and my impressions concur with that decision; which corresponds with lord Hardwicke's in Robinson *vs.* Gee, 1 Vez. 254, Priest *vs.* Parrot, 2 Vez. 160, and, in a much harder case, 3 P. Wms. 339.---Cases to the same effect may be multiplied much farther: on the other hand, I am well aware, that others may be produced, where the doctrine contended for by Mr. Blackstone in the case of Walker *vs.* Perkins, above-mentioned, has prevailed: but I incline to the contrary opinion, as thinking that all contracts founded on motives or considerations against the policy of the common law, or against the provisions of a statute, or against the policy of justice, or the rules and claims of decency, or the dictates of morality, are void both in law and equity, and ought not to have the aid of a court to carry them into effect. A combination between a debtor and a particular creditor to defeat all the other creditors of the debtor of their executions against his estate, is one of great moral turpitude, more especially on the part of the debtor, altho' the project may have been proposed on the part of the creditor. For the debtor is bound to do an act towards his creditors;....that is, to pay them their just debts, and this *in foro conscientiae* he is bound to do punctually and without delay. There is no such obligation on the part of any other than the

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debtor: a contrivance to defraud on the part of the debtor acquires, as I conceive, an additional degree of moral turpitude from this previous obligation to pay, superadding to the *neglect* of a moral duty the *commission* of a moral injury. But, without pretending to balance the guilt of the parties against each other's, *both* appear to me so culpable, that, had Austin been the plaintiff and Winston the defendant, I should have held him as little entitled to the aid of a court as I now think Winston.

But, it may be said that *Austin's* situation as a creditor, with an execution in his pocket, gave him a control over Winston, which might have its influence: the law admits no such excuse for injuries to a *third* person. Had *Austin* proposed an *usurious* contract, the argument would have applied; because a party assenting to an *usurious* contract, merely to gain further indulgence, is supposed to injure nobody but himself. But one assenting to a proposal to *rob* another, either on the highway, or by any collusive agreement with the party proposing, has, I apprehend, no such excuse in his favor, either at law or in equity. Besides, there is no evidence of threats or importunity.

But, to give a color to the case, the bill suggests that *Winston's* creditors will be injured unless relief is given. But *Winston's* creditors are not parties to the bill. If they had been, I should have thought them entitled to relief. And, if this bill be dismissed, I should hold them still entitled to it.

For these reasons, I am of opinion that the Chancellor ought to have dismissed the bill. But, as the court is probably divided upon this point, I shall proceed to consider what relief the Chancellor ought to have given; (since, by a division of the court upon this point, the decree, so far as giving some relief, must be affirmed;) and, even admitting Winston entitled to relief, the measure of it in the decree far exceeds any estimate in my mind.

Austin by his execution had a legal *lien* on *all* Winston's negroes. If less than all would not sell for enough to pay it off, all must have been sold, without reserve. If a part only would have been sufficient, it was Winston's fault, no less than Austin's that more than would have been sufficient were exposed to sale; and *volenti non fit injuria.* The most that Winston can claim, I apprehend, is the excess of the value of the slaves, as they might have sold, if the sale had been perfectly fair, above the sum due upon Austin's execution. Having assisted in pre-

venting the slaves from selling for their full value, or rather, being, as far as I can discover, the sole agent who prevented others from bidding, he ought, so far, to take the consequences of his own folly, or depravity. Subsequent purchasers from Austin, who was notoriously the highest bidder at a public sale, and confessedly, on the part of Winston, a fair purchaser, ought not to be affected by any secret agreement between them; even, if that agreement had not been fraudulent, as it undoubtedly was in its foundation. The executors of Winston are no more entitled to favor, than the executors of Austin; perhaps less, as one of Winston's executors appears to have been present at the original agreement between Austin and Winston: but I lay no stress upon this, at present.

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I am therefore of opinion that the utmost that the complainant is entitled to is the difference of the value of the slaves, which actually came to the hands of Austin, and were afterwards sold by him to the other defendants, or were retained by him, as the slaves would have sold at public auction on the day of the sale for *cash*, and the prices for which those slaves sold, after deducting therefrom the full amount of Austin's just debt; with legal interest on the balance, if any, until paid; that the value of the slaves as they would then have sold, upon those terms, be ascertained by a jury, and that the depositions taken in this cause, so far as the same relate to the value of slaves *at that time*, may be given in evidence by either party, in case of the death or absence of the witnesses by whom those depositions were made, but no farther; and that an account of the amount of Austin's debt on the day of sale be taken, and the balance adjusted upon those principles; and that so much of the decree as dismisses the bill as to the other defendants, except Austin's administratrix, be affirmed.

Judge ROANE....This is a bill brought by the appellees, executors of William Winston, dec'd, against the appellant, administratrix of Chapman Austin, dec'd, praying execution of an agreement, whereby, it is alledged, that Austin bound himself to Winston, to permit him to redeem certain slaves of his, sold under an execution of Austin's, and purchased by him. The ground taken by the appellant in his statement is, not that Winston is barred from making the demand, by reason of the turpitude of his conduct, but that Austin made *no* such agreement, and committed no fraud against Winston, but acquired a *bona fide* title thereto, under the sheriff's sale. It is clear,

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from a full consideration of the testimony, that such an agreement on the part of Austin is proved, and that he delivered *possession* of the negroes, after the sale, to Winston; but afterwards repossessed himself thereof by various pretences, and by force and violence. It is also clear, that, if, in this transaction, Winston was guilty of no fraud to Austin or others, or, (in case he did commit a fraud,) if that fraud was neutralized and palliated by the hardship or peculiarity of his situation, there is then nothing to impede the specific execution of the agreement. It is alledged, but not shewn, that there were creditors of Winston who may be affected by the transaction in question: but this cause is now to be decided between the parties to that transaction only, and nothing now done can bar the rights of the creditors, if any, to overhale it hereafter, if they think proper to do so. In order to shorten this discussion, I will readily admit, that the conduct of both the parties to the transaction tended to set up a fraud against other creditors, if there were any; and the real question is, whether a proper apology for such fraud exists on the part of Winston, arising from the circumstances in which he then stood.

A great mass of testimony exists in the cause, all of which I have duly considered, but none of which I shall particularly repeat, as I am governed very much, in this case, by general principles: but the case, as it respects the question before us, is briefly this: That Winston, indebted to Austin on a replevy bond for had no other tho't or intention but that of selling his land and paying the debt; that Austin applied to him for payment; *first advised him* to sell his negroes rather than his *land*, alarmed him with the danger of being reduced to beggary by his *own*, and Geddis Winston's debts, and, putting on the guise of a friend, proposed to him the plan which is detailed in the testimony; and that Winston, confiding in him, dreading the impending danger, and seeing no other mean of relief than this, even against Austin's own execution, readily clutched the proposal, acted his part in the furtherance of it, and his negroes were sacrificed at the sale, unless Austin be now held to his agreement.

The great principles, on which this question is now to be decided, are common to those cases in which oppression and imposition are expressly guarded against by statute, in aid of the general principles of law and equity, (such as the case of usury and the like,) and such cases wherein no statutory provision has been made. The se-

lection of a description of cases, which are of crying enormity, and demand the powerful interposition of the legislature to aid the general principles of law, does not abandon other cases standing on the same ground, but which, perhaps, do not require any statutory aid. The selection of usury, for example, does not surrender that protection which the law has ever afforded to debtors against the influence and power of their creditors, to young heirs against those who seek to devour them, to wards against their guardians, and to various other descriptions of persons standing on a similar ground, and whose imbecility in such a contest has always received the protection of courts of justice....3 Bac. 306. All these cases proceed on this ground, that, for a contract to be binding, the parties must be *free*, and that no man can be considered as *particeps criminis* in a transaction, unless he entered into it *freely*, (2 Fonb. 218:) and it is a general principle, that the doctrine in favor of young heirs is extended to all persons the pressure of whose wants may be considered as obstructing the exercise of their judgment.... 1 Fonb. 124. Gentlemen may be as loud as they please in denouncing fraud, but there can be no fraud, which merits the utter reprobation of a court of equity, unless, (if it is not supererogation to say so,) it be entered into *freely*, and *mala fide*. The *general* doctrines to be found on this subject in Fonblanque and other books, in which relief is reprobated by a court of equity, are confined to cases in which a *voluntary* fraud has been perpetrated, and in which no apology is to be found in the oppression and distress of the party's circumstances. Even in that event, relief is only granted to the distressed party: the volunteer in the fraud is forever bound thereby. I say the *general* doctrines to be found on this subject;....but there are special cases which merit a more particular examination. Many of the cases upon this subject relate to frauds on marriage agreements, which have nothing to do with this question; not only because they are frauds on marriage treaties, which have produced an indissoluble union of the parties, and therefore must forever bind, or the wife and family be irreparably injured; but are also voluntary frauds committed under no pressure. These agreements in fraud of marriage we are told (2 Wms. 619, *North vs. Ansell*,) must *bind*, on the ground that you cannot put the wife in *statu quo*, or unmarry the parties; and marriage is so much favored in equity, that

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we are told (3 P. Wms. 66) that it is a case, and perhaps the only case in equity in which a *particeps criminis* is permitted to avoid his own acts; so highly favored is the consideration of marriage.

Most of the other cases put by the judge who preceded me (if not all of them) are susceptible of answers which do not impugn the great principle I contend for. In the case of *Small vs. Brackely*, 2 Vern. 602, and decided in 1706, (and I beg that the answer I offer to it may be extended to other cases of a similar nature) it was decided that the plaintiff, (who had committed a great fraud against the defendant in the first instance and *then* became bankrupt, after which he paid £100 and gave a bond for £75 to his injured creditor to enter into a composition with his other creditors for his relief,) should not be relieved as to the said money and bond, altho' it was in fraud of the other creditors. The Chancellor in giving his decree laid stress upon his *original fraud* and breach of trust;....but at this day the grounds of that decision would certainly be exploded, (I mean independently of the *original breach* of trust:) at that time the case of *Tomkins vs. Barnett* was held to be law, on the ground of *volenti non fit injuria*, and money paid on an usurious contract, could not have been recovered back, in an action for money had and received. But at this day the case of *Tomkins* and *Barnett*, is utterly exploded; the payer of the money is not held to be a *particeps criminis*, on account of the duress of his situation, and the contract as to him is cleansed of its impurity. A case on this subject, to be in point, should shew, that relief cannot be obtained in equity since a recovery has been *legalized* in courts of law; but in truth the principle of that decision has been since over-ruled, in the cases of Bosanquet and Dashwood and others....holding that money paid by coercion may be recovered back in equity as well as at law; and that equity will even go beyond the law in affording relief in such cases....2 Fonb. 218.

The doctrine I subscribe to, therefore, is this, that in cases of *equal* frauds committed against third persons, (I mean where the parties thereto are *equally* guilty) altho' such frauds operate no injury to the rights of such third persons, and create no *rights* in favor of the parties thereto, yet in that case *possession* stands for the *right*; and that one volunteer in such fraud, may, as against his *equally guilty companion*, retain any advantage he has gained. He may not only as against him retain money thus ini-

quitously acquired, but retain, in absolute right, property which would otherwise be liable to redemption:....but in both cases *right* is out of the question, and if the *turpitude* of his adversary is annihilated or done away, his possession or his advantage cannot avail him. He does not stand on any merit of his own, but merely on the ground of the incompetency of his adversary to be received or countenanced in a court of justice, to set up a scandalous pretension, in which he is *equally* particeps criminis with himself:....but whensoever the criminality of his adversary is held not to exist, and the transaction, as to him, ceases to be scandalous, equity does not refuse to hearken to his pretensions.

In the cases I shall presently put, as arising under the statute of usury, the statute of bankruptcy in England, and even the common law case of money paid by a debtor to his creditor beyond the principal and interest, in all which cases money paid under duress, and in fraud of other creditors, was recovered back in an action for money had and received, that recovery was *only* sustained, on the ground, that in fact no *fraud* was meditated by the persons paying the money, or rather that the fraud was purged and the conduct of the parties purified by reason of the duress of their situation. On no other ground than this, could that action have been sustained; an action which only lies where the plaintiff *ex aequo et bono* (which implies innocence of fraud,) ought to recover, and which has been aptly compared, (as to this point,) to a bill in equity. If in the actual case before us, the appellee had (in addition) paid to the appellant a *sum of money*, as a consideration for his accomplishing the transaction in question, would it not be an enormity, that while the advantage gained by the appellant by the possession of the money should not avail him against the effect of an action for money had and received, and the appellee was acquitted by reason of his situation of all fraud in relation to the transaction, (without which the action at law could not be sustained,) that the adverse party, for whom no such apology exists, should, in another forum, expressly instituted to relieve against frauds, and execute agreements, retain the advantage he has gained, discharged of its condition, and pocket the fruits of his iniquity?

But it is said, or may be said, that this creditor was not a perfect *Shylock* to his debtor, that the fatal scales were not yet uncased, nor the hapless victim yet pinioned for the operation. If it were necessary, (but it is not,)

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I might be almost justified in taking the affirmative of this picture in relation to the creditor; and the creditor himself has almost admitted the affirmative also, in relation to the debtor. Deplorable indeed was his case depicted to be by the appellant;....and it is a good general rule, that, (between the parties,) things shall be taken to be, as they are represented to be. But all this has nothing to do with the question. I go upon general principles; but at the same time do not admit, that the facts of the case before us weaken the force of those principles in relation to it. It is not necessary, and has never been so decided, that the oppressed man or the debtor must be driven to the *wall*, and have no other possible refuge but in the proposal suggested to him by his creditor, or other person standing in a relation to him which implies an undue influence. In all the cases of relief against usurers, offenders against the bankrupt laws, guardians getting advantage of their wards, counsel of their clients, goalers of their debtors, monied men and usurers entrapping young heirs, &c. &c.; as well as in the case of debtors, the law goes upon general principles, and takes it for granted that persons in those situations, are peculiarly liable to imposition. It enters into no minute examination of the artifices of those entrapping on the one hand, nor on the other hand, whether the person entrapped might not have subsisted yet a little longer, without submitting to the meditated imposition. It goes on the ground of *mala fides* on the one hand, and the necessity of preventing imposition on the other. It goes upon the general ground of preventing iniquity and extortion.

I will not deny but that courts of equity might, in flagrant cases, go into such an enquiry; but the proofs in the case before us do not make it necessary to depart from the general principle, in this instance..... The black series of rigor, injustice, fraud, violence and oppression, of which this record clearly convicts the intestate of the appellant, on the one hand, shews whether he was not a creditor to be dreaded: and on the other hand, the dismay naturally resulting from executions on replevy bonds, in those days, when property is proved to have been sacrificed at sheriffs' sales, (to say nothing of Austin's own strong and interested portrait on this subject,) enables us to judge whether Winston, assailed too by the cries and tears of his family, had not just cause of alarm and apprehension. Make the *worst* of this case as it respects Winston, it clearly appears, that he was not

only seduced by Austin from his honest intention of selling his land and paying his debt, but that his purpose was not so much to defraud his creditors, as to escape from the execution of Austin, and shelter himself and family from destruction.

But it is said by the Judge who preceded me, that Winston was *probably* indebted, that his conduct was a great violation of morality in respect to his creditors, and that in point of morality, he was most culpable. That Winston violated the principles of morality is already implied by the admission that he had committed a fraud: but that fraud is palliated and excused by reason of the imbecility of his situation. But how does the case stand in relation to Austin? Who shall not be permitted, in a transaction of this kind, to hold up his face, either in a court of law or equity, unless his competitor be *pari delicto* with himself. To say the *least*, he hatched and brought to maturity a *free* and voluntary fraud to the injury of Winston's creditors: to say the *truth*, he capped the climax of his iniquity, by committing a double fraud towards his companion. So little regardful was he of the rules of morality, that he has not even observed a maxim sacred among thieves and felons, to be just and honest towards one another. It is with great reluctance, Sir, that I make these strong observations, but the truth of the case, and the ground I have taken on this occasion, demand it from me. It is necessary, in deciding whether the culpability of the parties is equal, to take a view of the conduct and situation of them both.

I will now avail myself of the mention of some common law decisions on this subject in which the ground I have taken is, even in the law courts, solemnly and ably supported. Some of these cases arise from the violation of statutes, made in aid of the general principles protecting persons from oppression, but one of them at least, (and many others might be found,) stands merely upon the common law principle. There is so great an analogy between this whole catalogue of cases, whether considered as in equity, at common law, or under the statutes, that I can make no discrimination between them. Great *principles* are not to be shaken, by particular modifications and provisions, especially in a court of equity. I will premise that some of the old cases, and especially the leading case of *Tomkins* vs. *Barnett*, are strongly and justly exploded in the cases I shall now mention. That leading case, as I have already said, denied the recovery

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of money paid to an usurer, beyond legal interest, in an action for money had and received: it was so decided too on the maxim, (now strongly exploded, as applicable to that and similar cases,) *volenti non fit injuria.* The modern and exploding decisions will now run through, and affect all cases in which the party paying the money, is not *free.* The old cases, (now exploded) produced, as I humbly conceive, the decision of Small vs. Brackley, (already noticed) and other cases of a similar nature:.... and when, in addition to this, it is recollected that courts of equity have concurrent jurisdiction with courts of law in decreeing a recovery of *money* under like circumstances; what prevents equity, which delights in decreeing contracts to be performed in specie, from doing so in a case like the present? But I must return to my subject.

In the cases now to be noticed, it is on all hands admitted as a general, perhaps as an universal proposition, that *in pari delicto potior est conditio defendentis:* but in the application of this rule, some important distinctions have been solemnly and ably settled. It is said in them, that the prohibitions enacted by *positive law*, in respect of contracts, are of two kinds; 1st. to prevent weak or necessitous men from being over-reached, defrauded or oppressed; and, 2d. those prohibitions which are founded on reasons of policy and public expedience. (Cowp. 800, Clarke vs. Shee....ibid 702, Browning vs. Morris....Doug. 670, Smith vs. Bromley.)

Under the first class of cases, it is held, as has been already said, that money paid under an usurious contract, beyond legal interest, may be recovered back in an action for money had and received; and that money paid by a bankrupt, or even a friend of the bankrupt, in England, for his consent to sign a certificate, (which is made illegal there by a particular statute,) may also be recovered back in a like action. The principle on which these decisions proceeds, is, that there is not in those cases *par delictum*; for that the oppression and distress in which one of the parties stands, places him within the power of the other, and mitigates the culpability of his conduct. Those statutes are professedly made to prevent oppression; and the act of a party arising only from his oppressed situation and the severity of those under whose power he is placed, shall not bind him and defeat the very end of the statute. It is not necessary for me to say any thing respecting the other class of cases, as they are not analogous to the case before us, but merely, that where a recovery is inhibited

in them, there is nothing in the circumstances or situation of the plaintiff which exempts him from being considered as equally criminal with the defendant.

In the case now before us, there is no *positive statute* contravened, as has been often said, such as those alluded to in noticing the first class of cases before mentioned: but the *principles* on which such statutes have been made, have been violated in the case before us. A debtor under a severe pressure of his circumstances, and under the influence and high colored representations of his creditor, has consented to a proposal dictated to him by that creditor. Was the debtor *free* to refuse or accede to this proposition? He certainly was not.

But we need not rest this part of the case on general reasoning, and on the pointed analogy which exists between this case and those just noticed, arising under positive statutes: for in Bul. N. P. 132, it is held, "that if a "person under the influence of his creditor, pay *more* than "legal interest, he may recover it back, for he is under a "moral tie to return it." In that case, (as in this,) did not the debtor also commit a fraud upon his *other* creditors, if he had such, by paying to the *particular* creditor an illegal sum, which should have been reserved for his *general* creditors?---In this case, (as in that) is not Austin under a moral tie to comply with his agreement for redemption? An agreement, the violation of which will involve a double fraud, first upon Winston's creditors, and then upon Winston himself!

If in the case just quoted from Buller, a recovery was had on general principles, our case is rendered much stronger by the consideration that Austin, having an execution against Winston on a replevy bond, strongly depicted to him the desperateness of his situation, and pointed out to him the plan he proposed, as the only mean of saving his family from destruction. Was Winston, ignorant himself of the law, alarmed by the representations of Austin, and seeing, perhaps, no refuge from his then situation, but in the adoption of Austin's proposals, *free* to refuse that proposal?---Let the general principles which dictated the statutes before mentioned; let the feelings of all men placed in like circumstances; let that benignity of the law, which compassionates the infirmities and the distresses of men, answer the question.

But wherefore shall a specific performance of Austin's agreement with Winston be not decreed? Does any one pretend to say that *he* (Austin) is entitled to any favor?

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And admit, for a moment, that Winston, on his own merit, is not entitled to a specific execution of the agreement; shall we not consider the case of his other creditors? In decreeing for him, are we not also decreeing for them? By decreeing the negroes to Winston, unshackled by any conveyance of them to his children, (which was a part of the plan suggested by Austin,) they are immediately liable to the executions of his other creditors; whereas, by deciding in favor of Austin, those creditors can never come at them, without a tedious suit in chancery, against Austin to annul the sale under which he acquired them. Whether, therefore, we consider the actual interests of Winston's creditors, or wish to avoid a circuity of action and multiplication of suits, we ought to decree a performance of his contract against Austin, in the present case.

But it is said that he who comes here for relief must draw his justice from pure fountains. The same is said, and justly said, at law, in the action for money had and received (Buller 132.) But in the law cases before put, the fountain from which the plaintiffs drew, was held to be purified by the duress and peculiarity of their situation. Such, also, I apprehend, is the case before us. It is further said that specific agreements are in the discretion of the court, and will not be enforced but where all is just and fair. Agreed....but it would seem that supporting an action for money had and received, would give a good *general* rule on this subject; which action only lies, where *ex aequo et bono* the plaintiff ought to recover.

Two circumstances were relied upon by the court of King's Bench, in the case of Smith vs. Bromley, which I will briefly remark upon, as strongly applying to the present case, and then dismiss this part of the subject. The first is, that the fraud there effectuated against the bankrupt laws, *moved* (as in this case,) from the creditor to the party oppressed, or rather to his sister, who from motives of affection, acted for her brother, and placed herself in his situation. The second circumstance is, that the action was sustained in that instance in order to discourage frauds of that nature; for a discouragement to *take* money, on illegal considerations, would clearly be operated, by holding the *takers*, liable to *refund* the money so illegally taken. So, in the present case, let us cut up by the roots, and discourage, enormities like the present, by making the chief actor in the fraud disgorge his iniquitous gains: let us not forget that men will generally

act right when there is no temptation to the contrary. By dismissing the appellee's bill *entirely*, will you not ratify to Austin the *entire* fruits of his iniquity; and will not this effect be *partially* produced, in so far as you stop short of an actual restitution in specie, or an actual restoration of the value of the property with interest?

With respect to the particular decree in question, I see no reason to alter it, or disturb it. If Winston is entitled to a specific execution of the agreement, he is entitled to the negroes themselves, (where they have not *bona fide* lawfully passed to other persons,) and to their profits. A trustee is liable for the *just value* of the thing converted, and the *cestuique trust* is not to be bound by any injurious sales made by him. The decision of this court in the case of Reynolds vs. Waller (1 Wash. 164) comes fully up to this point.

As to the *general table*, by which the profits were settled in the present case, it is not shewn (if pretended) that it has wrought any injury. With respect to the vendees of the slaves it is unnecessary to decide whether the court has power to affect *their* interests, or, in other words, whether they may be considered as now before us; for, on the merits of the case, it is clearly shewn, that they purchased *bona fide*, without notice, and for a valuable consideration. Austin himself has taken this ground in his answer; and as he has done the same in relation to Campbell, it does not now lie in his mouth to object that Campbell is not made a party. He has taken the ground in his answer, that Campbell's right to the negroes can never be impeached by Winston, and ought now to submit to a decree predicated upon that admission. That admission is competent to bind Austin, and may be closed with by the other party, (as is done in the present case,) but would not have prevented Winston from contesting the same, and going for the *identical* negroes, had he thought proper. Nothing is more common or right than to drop parties to a suit, when in the progress thereof it seems consented to on both sides, that such parties are unnecessary. The delays and difficulties incident to suits in equity are great enough already. In the case of Paulet vs. Lincoln (2 Atk. 310) it is held that a plaintiff may, *at the hearing*, waive the relief he prays against a particular person, and that then the objection that he is no party will have no weight. So in this case, the plaintiff, before the hearing, suffered the suit to abate as to

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Campbell, confiding in, and closing with Austin's statement of the sale made to him, and waving his claim to go for the *identical negro* against the representatives of Campbell.

I have thus endeavored to explain the grounds and reasons of my opinion. On the great question whether relief shall be granted, I am happy to find that the concurrence of one other judge on this point will secure some relief to the appellees. As to the measure of that relief, I regret that I cannot entirely accord in the *projet* proposed for a decree, great as my respect is for the quarter from whence it came. I cannot readily see that any other decree than one for the *identical negroes*, or their just values, with interest and profits, will either accord with justice, with previous decisions by this court, (Waller and Reynolds, and others,) or with the principle of preventing the appellant from enjoying the fruits of his iniquity. I cannot readily see, that when it is admitted, that an action at law, or in equity, would lie, for recovering back money paid for the furtherance or accomplishment of a contract like the present, thereby disaffirming the turpitude of the plaintiff, and admitting the iniquity of the transaction as it relates to the defendant, the court will not go on, and pursuing the same principles, disrobe the transaction, (as between these parties,) of its iniquity, by holding the defendant to the stipulated condition of redemption. I cannot well see that the appellee should be held in the present case, to a valuation commensurate with the probable product of sheriffs' sales in those days, when it is in proof that he had intended to sell his land rather than his negroes, before the intromission of the appellant with his plan of seduction, & might have done so with perhaps less loss, than would have arisen, from a sheriff's sale of his negroes, as appears by the testimony. In event too, for every thing depends upon the opinion of the jury, the appellant himself may be actually placed in a worse situation than if he were decreed to a specific performance.

Yet after all, I am not so sanguine on this point as on the other. I am not prepared to say that the sustentation of an action for money had & received, affords an universal rule for decreeing a specific performance. I well know that the exercise of this power depends much upon circumstances & the discretion of the court. In a case, therefore, depending upon a mass of facts & testimony, I will not obstinately contend against the opinions of the other judges, that an actual specific performance and nothing else ought to be

decreed. I will therefore concur in the extent of the relief proposed, (after having declared my sentiments on both points,) and thus afford some, though I think an inadequate relief to the appellees. I will on these grounds, and on these only, assent to the decree which has been agreed upon in conference, as the result of mutual concession and compromise.

Judge CARRINGTON....There is no rule in law or equity that may not be varied in cases attended with peculiar circumstances, so as to come at the true justice of the case.

It is admitted that Austin and Winston entered into a base combination to defraud the creditors of Winston. But upon an accurate examination of the testimony and circumstances of the case, I think the latter is not altogether subject to the operation of a well-known maxim in equity, "That he who hath done iniquity shall not have equity;" or, in other words, shall not receive the countenance of a court of equity. I think, under all the circumstances, that the representatives of Winston are entitled to relief; but not to the extent of the decree of the High Court of Chancery.

I am for reversing that decree, and concur with the other Judges in a decree formed at our chambers now ready to be declared by the president. By this decree Austin will be punished for the fraud, by being bound to pay for the slaves in question the difference between the price for which he sold them and the reasonable value: on the other hand, Winston will be punished on his part, by being bound to take a reasonable price for slaves he wished to have kept; and, thus, two innocent families may probably retain a subsistence.

But, so far as respects myself, it is not to be considered that any principle is here fixed so as to operate as a precedent in other cases. This decree is adopted to fit the present case only: and it is hoped that so gross a fraud may not again be brought before this court.

Judge LYONS....If a creditor extorts money from his debtor in distress, on account of indulgence to him, or more than legal interest, it is illegal and oppressive to the debtor and his family; and, as no third person is injured or contemplated to be injured, or in any manner defrauded by it, there, and *in such case only*, the oppressed debtor or borrower, from whom money has been so illegally extorted, shall or may recover the money so extorted and paid beyond legal interest, by action at law or

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bill in equity; as is said by lord Mansfield, in Smith *vs.* Bromley, cited in Jones *vs.* Barkley, Douglas 696, (see also 2 Atk. 310, and 1 Fonb. 218.) But where the debtor colludes with the creditor, and meditates a fraud and deceit upon a *third person*, no party to the fraud, to deprive him of his just debt or claim, by selling at under value and conveying away an estate which would be subject to his debt, in order to protect it from execution, it is said to be so iniquitous that, if the debtor requires a nullity of the contract, such a demand, which is scandalous, ought not to be granted to him; as it is a maxim in equity that "he who hath committed *iniquity* shall not have *equity*," 1 Fonb. 128....and lord Mansfield, in the case of Montefiori *vs.* Montefiori, 1 Bl. Rep. 364, says, that no man shall set up his own iniquity as a defence, any more than as a cause of action, where a third person is affected by it. I was therefore, at first, strongly inclined to think that the fraudulent conduct of Winston in the present case excluded him from any claim for aid or relief in equity. But that being doubted by some of the judges, and there being a diversity of opinions respecting it, the rules before mentioned being thought by some too rigid to be adhered to in this case, under all its circumstances, as it might be supposed that Winston, who was a distressed debtor, was tempted and inveigled into the agreement, respecting the sale of his slaves at under value, by the persuasions and fair promises of Austin, who deceived him, (though why Austin should injure Winston without benefiting himself I cannot conceive, he having offered to sell to others most of the slaves at the same prices he bid for them,) I have concurred in the decree formed by the judges, which I am directed to report as follows:....

The decree of the High Court of Chancery is reversed ....and an issue is directed to be made up and tried before the Richmond District Court, to ascertain what the slaves taken and sold by the sheriff of Hanover to satisfy Austin's execution in the bill mentioned, (except such of them as were returned to the complainants, or have otherwise come to their possession,) would have sold for in ready money, on the day of the sale, if then fairly sold, without the interference or collusion of Austin and Winston, to a *bona fide* purchaser or purchasers; on the trial of which issue, all the depositions taken in this cause relative to the sale and prices of the said slaves, if the witnesses be dead or absent, shall be admitted to be read as evidence

to the jury, together with any other legal evidence, by witnesses or otherwise, which either party may produce; and that Austin be charged with the prices of the slaves as found by the jury, and be credited for the amount of his debt, with interest at 5 per cent. to that day, and that the appellant out of the goods, &c: to be administered, pay the balance or overplus of the sales to the appellees, with interest from the day of sale and the costs in chancery.

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TURNER and others, surviving Justices of Fauquier, *against* CHINN'S ex'ors. and others.

Tuesday, 14th October.

THIS was a suit originally brought in the District Court of *Dumfries*, by the appellants against the appellees, on an executor's bond. The declaration was on the penalty, without noticing the condition: the defendants, after taking *oyer*, pleaded "conditions performed:" to which the plaintiffs replied, and assigned for breach of the condition, that the surviving partners of Dunlop and Son and Co. had recovered a judgment in a prior suit, against Rawleigh Chinn, executor of Charles Chinn, dec'd, for a sum therein mentioned, which was still unpaid; a copy of the proceedings in that suit, which shewed that it abated against the other executors, also a copy of the judgment against R. Chinn, with the execution and sheriff's return thereon, that he had "removed to Kentucky," were referred to as part of the replication; which further alledged that R. Chinn had more goods and chattels of the decedent than were sufficient to satisfy the said judgment, and that he had *wasted* them, &c. whereby the surviving partners of Dunlop and Son and Co. had lost the effect of their judgment.

To this replication the defendants demurred; and assigned as causes....1st. That it was not charged, that *all* the executors of Charles Chinn, had *wasted*, &c....2nd. That it did not appear that a suit was ever brought against Rawleigh Chinn, to subject him to the payment of the debt, in consequence of the *devastavit* alledged against him, and 3rd. That the replication was in other respects erroneous.

The District Court, on argument, sustained the demurrer; from which judgment an appeal was taken to this court.

A judgment against an ex'or. or administrator *as such*, with a return on the execution "that he has removed out of the state," is not sufficient evidence of a devastavit, to ground an action on the bond given for the performance of his duty.

Qu? Is it necessary, after a judgment against an ex'or. or administrator *as such*, and a return of "*no effects*" on the execution issued thereupon, to bring a *second* suit to establish a devastavit, before an action can be maintained on the bond

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The Attorney General, for the appellants.
Botts, for the appellees.

It is deemed unnecessary to insert the points made by counsel, in this cause, as the court (consisting of *Lyons*, *Carrington* and *Tucker*, Judges,) on Thursday, the 16th of October, affirmed the judgment of the District Court, solely on the ground, that the judgment against the executor, as such, with the sheriff's return upon the execution, that he had "removed to Kentucky," did not warrant an action on the executor's bond. They were therefore of opinion that the demurrer had been rightly sustained.

given as aforesaid.*

* N. B. It being understood that a case is now depending which will bring the single point last mentioned before the court; it was agreed by the Judges that it should be open to discussion, notwithstanding the cases heretofore decided by this court; none of which, it is believed, have directly settled that question.

Friday, 17th October.

BIGGERS's Adm'r. *against* ALDERSON.

On a demurrer to evidence, an *unconditional* verdict is not error, provided the demurrer be afterwards determined by the court.

In detinue the jury may exceed the prices of the slaves laid in the declaration.

Under particular circumstances, parol evidence of continued possession on the part of the grantor and of the grantee's ac-

THIS was an action of detinue brought by Alderson *vs.* Biggers, for sundry slaves, in the county court of Lunenburg.

At the trial of the cause, on the plea of *non detinet*, before any evidence had been heard on the part of the plaintiff, the defendant introduced a copy, attested by the clerk of Lunenburg court, of a bill of sale from the plaintiff, conveying several of the slaves in question to a certain Joseph Smith; under a clause in whose last will and testament the defendant claimed them; which copy was permitted by the court to go as evidence to the jury.... It was dated the 28th of December, 1784, attested by Tommy Biggers (the defendant himself) and Peggy Biggers his wife, and recorded at Lunenburg January court, 1785, being proved by the oath of "one of the witnesses thereto;" but the certificate of the clerk does not mention which. The plaintiff filed a bill of exceptions to the court's opinion, and moreover offered parol testimony to prove an implied verbal release by Joseph Smith of the right claimed by him by virtue of the said bill of sale; to the admission of which testimony the defendant objected, but the court over-ruled the objection, "*because the original deed was not produced.*" The defendant thereupon

excepted to the opinion of the court, and moreover *demurred* to all the plaintiff's evidence; the substance of which was that, at sundry times, from the year 1789, to the year 1795, Joseph Smith declared "that the negroes in ques-"tion belonged to Alderson; that the bill of sale he had "taken for them was worth nothing; that Alderson was "addicted to drinking; that he owed about £20, and "that the bill of sale was executed to prevent the negroes "from being taken to pay the said debt, being intended "for the benefit of Rachel (meaning Alderson's wife, "who was Smith's sister,) and her children; that Willi-"am Cowan had threatened to make him sell them to "pay himself (the said Smith,) but that he did not know "that Alderson owed him one farthing; for he had done "a great deal of work for himself and his sons, and they "had never had a settlement; but he hired the negroes "to him for a blind, and *that* would stop all their "mouths:"....that Lydia, (one of the negroes,) and the rest, who were her children, had remained in the plaintiff's possession, from the time when the bill of sale was executed until the year 1794; and had been regularly listed to him in the books of the commissioners of the revenue from 1785 to 1794.

knowledgment of his right may be given in evidence, for the jury to presume against a deed, that the grantee has relinquished or reconveyed his right.

Semble, that in detinue, where a demurrer to evidence states that the defendant in support of his right offered a bill of sale, and no *other* evidence of the defendant's possession is mentioned, *that* is sufficient to prove the said possession.

The above was all the evidence on the part of the plaintiff, and none was introduced by the defendant, except the aforesaid copy of the bill of sale. The demurrer being tendered, the plaintiff joined therein; whereupon the jury found a *general* and *unconditional* verdict for the plaintiff for the negroes in the declaration mentioned, stating their respective values at higher rates than those mentioned in the declaration, and £50 damages for detention. The demurrer was afterwards argued, and over-ruled by the court, and judgment entered for the plaintiff; from which the defendant appealed to the District Court, where all the proceedings back to the joining of issue were reversed, without assigning any cause in the record for the reversal, and the suit retained for trial at the District Court bar. A verdict and judgment were entered for the plaintiff, from which Biggers appealed to this court; where the appeal abated by his death, and was revived by his administrator.

Randolph and *Stuart*, for the appellant, made the following points:

1. That the county court erred in admitting parol evidence, which went to the total destruction of the bill of sale; or to prove it to have been intended as a mortgage.

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2. That Alderson was estopped, in a court of law, from alledging any thing in contradiction of his own deed, which being, moreover, executed with a view to defraud creditors, ought to be binding on *him*; and should prevent him from obtaining relief even in a court of equity.

3. That the hiring of the negroes by Smith to Alderson, was an evidence that there was no adverse possession in the latter, (for *his* possession was that of Smith's,) and prevented Alderson from acquiring a title by length of possession.

4. That the price of the negroes having been fixed *higher* in the verdict than stated in the declaration, it could not be sustained. On this point, the case of Custice and Posey, in the old general court, was mentioned.*

Hay, *Munford* and *Geo. K. Taylor*, for the appellee, contended, 1. that the county court decided correctly in admitting the parol evidence to prove the release. 2. that the judgment on the demurrer was correctly pronounced in the plaintiff's favor.

In support of the first point, they argued, that a man, who has executed a bill of sale or mortgage for slaves, may afterwards acquire a complete title to them without a deed, since slaves may be transferred by delivery only; that the uninterrupted possession by the plaintiff for more than five years, and Smith's acknowledgments of his right, were sufficient for the jury to presume a release or reconveyance (*a*); and that the court might, even have instructed the jury to presume a release. (*b*)

On the second point they insisted that by a demurrer to evidence, the defendant not only admits the facts stated, but every rational inference which a jury might deduce from them; (*c*) that the court therefore had a right to infer the release or reconveyance, as the jury might have done; that the bill of sale having been executed to secure a debt from Alderson to Smith, who acknowledged that he had received payment, he could thereupon be a *trustee*

(*a*) Cowp 43 Doug. 722, Esp. 457, Cowp. 214, Cowp. 217—See on the doctrine of presumptions Peake's law of Evidence, 2d edit. p. 20—25.

(*b*) 7 Term Rep. 2.

(*c*) 2 Wash. 203.

* The case of Custice and Posey, was said to have been this. In detinue for a horse and three cows, the jury found a verdict for the horse, at a price higher than that stated in the declaration, and for two of the cows, omitting the third. On the argument of the cause in the old general court, two points were insisted on; *first*, the variance between the declaration and verdict as to the price of the horse, and, *secondly*, the insufficiency of the verdict in not finding upon the whole issue. But the court of appeals, in their decision of the case of Butler vs. Parks, (1 Wash. 76,) referring to the case of Custice and Posey, seem to consider it as having been determined on the second point only; that is, the insufficiency of the verdict, no notice being taken of the variance between the declaration and verdict.

only, and could not set up the *trust*, even at common law, to defeat the claim of his *cestuy que trust*. (a)

In answer to the second point made by the appellant's counsel, they observed that estoppels are odious in law, and ought not to be encouraged; that they ought to be regularly pleaded and not relied on by way of evidence (b); on the question of fraud, they said that the bill of sale was not executed by Alderson with a fraudulent intention; that he did not owe at the time more than £20, except to Smith; that Smith might honestly have taken the bill of sale to secure himself; but that, whatever his intentions were, it does not appear that Alderson was accessary to any improper plan, there being no proof to that effect, except what resulted from Smith's assertions; that if the bill of sale was a voluntary conveyance to prevent the property from being lost by the drinking and imprudence of Alderson, it was not therefore void, since "every voluntary conveyance is not fraudulent, but, if there *was a reasonable cause for making it*, may be good even against creditors" (c); but if it be admitted that the bill of sale was fraudulent, the principle that a man cannot come into court, claiming against a deed executed by himself with a fraudulent view, does not apply to this case, because Alderson relied on his length of possession and Smith's acknowledgments; and Biggers, the defendant, cannot say the bill of sale was fraudulent, because he claims under it himself; that the principle moreover applies only to cases of equal guilt in both parties, not to those where fraud is not intended by the donor, but by the donee only; that in such cases the donor may set aside the deed on the ground of the fraud, and parol evidence is admissible to prove such fraud, (this being a matter extrinsic,) though not to change the terms of the deed, or to contradict it (d); that, even if Alderson was *particeps criminis*, his remaining in possession gave him a right, which would have prevented Smith or Biggers from recovering in an action against him, and that the *wrong* committed by Biggers in taking possession of the slaves could not give him a better title than he had before.

(a) Cowp. 43, Doug. 722, Esp. 457.

(b) Co. Litt. 227, a. Hob. 207, 10 Vin. 415, 423, 452, 454, 482.

(c) Viner F. p. 531—see also, ib 530, Mod. 119, 1'd Tenham vs. Mullins.

(d) Esp. 223, 2 Wils. 344, Collins vs. Blantern.

In answer to the third point, they contended that, in the county court record, there was no proof of the hiring of the slaves to Alderson, but Smith's own assertions; and, as to the fourth point, that the difference between the prices stated in the declaration and those found by the jury is unimportant; that the plaintiff could not fix those

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prices in his declaration, but this was afterwards to be done by the jury: and, where a suit is long depending, the values of young negroes will necessarily greatly increase by the time of the verdict; that 10 Co. Rep. 117, b states that in *detinue* the jury may give greater damages than are laid in the declaration, because the detention continues, and the damages sustained by the plaintiff must be increased during the pendency of the suit; the reason of which rule applies to this case; that it is sufficient that the identity of the slaves, mentioned in the verdict, with those in the declaration, be ascertained (*a*); and that the jury here had found for the plaintiff "the slaves in the declaration mentioned," stating their names, which exactly correspond.

(*a*) 3 Tuck. Bl. 152.

Randolph, in reply, cited Meres vs. Ansel, 3 Wils. 275, to shew that parol evidence cannot be admitted to annul a deed on the ground that it was invalid in its origin, or became so by matter subsequent. If the deed was intended as a mortgage, or trust, it must appear so upon its face. The case from 1 Esp. 223, relates only to bonds, which, in their nature are defeazable, but not to absolute deeds; and evidence cannot be adduced to convert the latter into the former. (*b*) To be like the present case, it must be shewn that to an absolute bond, some condition not specified on the face of it may be annexed: but was such proof ever admitted at law? (*c*) It is said that a release may be inferred, and various instances of similar presumptions have been mentioned; but they all presupposed the existence of a trust. The court improperly judged of the weight of evidence, by deciding that there was an implied parol release. Even a writing, to operate as such, must be so expressed: it cannot be implied; nor can the loose conversations of Smith supply its place. If they prove any thing, it is that Alderson held as trustee for his own wife and children, and therefore cannot avail himself of the act of limitations.

(*b*) 1 Term Rep. 619, 621.

(*c*) Ross vs. Norvell, 1 Wash. 14.

The various authorities relative to estoppels apply to cases only where the plaintiff, having an estoppel against the defendant, had failed to plead it; and gone to trial on the general issue. In such cases the plaintiff could not rely on the estoppel, as he had not pleaded it, and parol evidence was admissible in opposition to it; but no authority can be produced, which renders it necessary for the defendant to plead specially an estoppel. In this case, if he had pleaded it, and the plaintiff had replied "*per fraud*

dem," the defendant might have demurred; because the plaintiff was barred by his own solemn deed. (*a*)

He also adduced two new points, viz. 1. that the verdict was absolute, and not conditional, as it ought to have been upon a demurrer to evidence; and, 2. that the jury had found the prices of the negroes, and damages for their detention, without any evidence before them.

(*a*) Cowp. 600, 601.

Hay, as to the two new points, was about to argue the first, when it was relinquished by Mr. *Randolph*, who said he admitted that on a demurrer to evidence the verdict is necessarily to be considered as conditional. On the second, *Hay* observed that there was evidence stated in the demurrer, from which the jury might have inferred the values of the slaves, and estimated the damages for their detention. The commissioners' books proved their ages, and several witnesses stated that they were young and likely. Besides, it was usual for juries to find such a value as would compel the delivery of the specific thing, but not to estimate it with as much accuracy as they would in case of a purchase. The time when Alderson's possession ceased, (viz. after Smith's death in 1795,) appeared in evidence; and therefore the jury were enabled to calculate their profits, and ascertain the damages for their detention.

Curia advisare vult.

Tuesday, the 21st of October, the Judges delivered their opinions.

Judge TUCKER....The sole difficulty in this case seems to be attributable to an irregularity on the part of the *defendant* in the outset of the trial in the county court.... Without waiting to hear the plaintiff's evidence upon the plea of *non detinet*, which was the general issue in the cause, he first obtrudes upon the court his own; viz. a copy of a deed made to one Smith, (under whose will he claims the negroes,) in 1784, to which himself and his wife were the only subscribing witnesses; and then moves the court to reject the plaintiff's evidence of an uninterrupted possession of the slaves for twelve years before the death of Smith, who never appears to have been in possession of them. The plaintiff has an undoubted right upon the general issue to prefer his evidence first: then the defendant's is to be heard in avoidance of it; and if the plaintiff can offer any thing consistent with the rules of law to rebut it, he is then to be permitted to do so. Had this course been pursued, the evidence would have stood thus.

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The plaintiff proved an uninterrupted possession of the slaves in himself from 1784 to 1795. To repel this the defendant produces *a copy* of an absolute bill of sale for the slaves made by the plaintiff to Smith, (under whom he claims,) in consideration of £150 in hand paid; which had been proved and recorded in 1784: to rebut which the plaintiff offers *viva voce* testimony, that Smith had, on divers occasions, declared he had no title to the negroes; which was objected to, but admitted by the court, because the *original* deed was not produced in court. Afterwards, the defendant demurs to the evidence, and thus brings into view of this court the evidence objected to, which is not such as it had been described in the bill of exceptions. If this course had been pursued, there could have been little doubt in the breasts, either of the jury, had the cause been left to them, or of the court, upon the demurrer. For the jury would have been possessed of the material parts of the plaintiff's evidence; viz. his long and uninterrupted possession of the slaves during the life of Smith; and the only point for their consideration would have been, whether they ought not to presume a re-transfer and sale of the negroes to the plaintiff, in consequence of such possession, notwithstanding a copy of an old deed recorded twelve years before; the original not being *produced* nor proved to have been *lost*, (which ought to have been done, before admitting the *copy*, when objected to,) and might therefore be presumed, upon the circumstances shewn in evidence, to have been delivered up to the plaintiff or cancelled. No deed is *necessary* in case of a re-transfer and sale, where possession accompanies the transfer. The jury therefore might have concluded, upon the evidence before them, that such a re-transfer and sale actually took place. And it is now settled that the court may draw the same conclusions upon a demurrer to evidence, which admits the truth, but denies the sufficiency of the evidence to maintain the issue on the part of the plaintiff.

Had there been no demurrer to evidence, I should have thought the county court erred in admitting the evidence stated in the bill of exceptions to have been offered by the plaintiff. But the whole evidence, being inserted in the demurrer, appears different from the description of it, (for it is not stated verbatim,) in the bill of exceptions: and by the demurrer the consideration of the evidence objected to was drawn from the jury to the court, who might disregard what was impertinent to the

issue, or otherwise inadmissible; which a jury perhaps would not. The error, if any, was therefore cured by the *demurrer*; which must be considered as a waiver of the bill of exceptions, as to the evidence objected to.

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Upon considering the evidence stated in the demurrer in this manner, I have no difficulty in saying the county court decided upon it properly, and that the judgment of the District Court reversing that decision was erroneous and ought to be reversed, and the judgment of the county court affirmed.

Judge CARRINGTON....I am of opinion that the county court decided properly upon the demurrer to evidence; of course, that its judgment upon the verdict of the jury was regular. The defendant did not move for a new trial, but contented himself with an appeal to the District Court. That court reversed the judgment, without stating any reason for so doing; and it is presumable they did so, because the record furnished none.

The objection that the slaves were valued higher by the jury than the price laid in the declaration is no error. If the plaintiff had stated a higher value than the real worth, that ought not to have governed the jury. They were to fix the value, at the time of their verdict, as it appeared from the evidence before them. In the case of Taff *vs.* Irby, before the General Court in March term, 1779, *no value* was laid: the exception was taken, and the case was fully argued: the court determined the omission was immaterial, and gave judgment upon the jury's verdict. I now consider the value laid in the declaration, or even if there had been no value laid, as matters of no importance.

I am of opinion that the judgment and proceedings of the District Court ought to be reversed, and that of the county court affirmed.

Judge LYONS concurring, judgment was entered accordingly.

LEFTWICH and others *against* BERKELEY, Treasurer, &c.

Thursday, 23d October.

THIS was a suit brought in the General Court by William Berkeley, successor of Jacquelin Ambler, late treasurer of the commonwealth, against William Leftwich, A. Moseley and J. Callaway, and three other persons, as

A suit on a joint and several bond must be bro't either against

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securities for Gross Scruggs, late sheriff of Bedford. The declaration stated that the said securities, with Scruggs, entered into bond with condition for his faithful collection of the revenue for 1783; and assigned, for breach, that he did not faithfully collect, &c. The writ being executed on Leftwich, Moseley and Callaway, they pleaded "conditions performed;" to which the plaintiff replied generally. A jury was impannelled "to enquire of damages in this suit," and returned a verdict "that the plaintiff had sustained damages, &c.;" and judgment was thereupon rendered for the penalty of the bond, to be discharged by those damages, and costs. Scruggs, the principal obligor, was not a party to the suit; the reason of which does not appear; but an account from the auditor's office shewing that a judgment had before been rendered against him, was copied into the record. The defendants obtained from this court a writ of supersedeas.

all the obligors jointly, or *one* of them singly; & not against any intermediate number; and if an error in this respect appears on the record, the judgment will be reversed, notwithstanding such error was not pleaded in abatement.

Clark, for the plaintiffs in error. In this case, *seven* obligors are jointly and severally bound, and the action is brought against *six* only. The parties can only be bound, as they have agreed to bind themselves; and are liable to an action, either jointly against them all, or severally against each obligor individually. (a) If part of the obligors were dead, it would be admitted the action might be maintained against the survivors. Or, if a judgment had been rendered against the principal, and so stated in the declaration, the plaintiff might pursue the securities till he had satisfaction of his debt.

(a) 5 Bac. ab. 164 Gwil. edit. 3 Durn. & East, 782.

The jury were sworn to enquire of damages, when there was an issue made up in the cause; which issue ought to have been tried. On a writ of enquiry the jury were bound to find some damages, which, if only one penny, would subject the defendants to costs.

The Attorney General, for the defendant in error, insisted, 1. That the suit had been properly brought against the securities, a judgment having before been rendered against Scruggs the principal, on motion; and the objection that he is not named a defendant, cannot be sustained, either on principles of common law, or under our acts of assembly.

2. That, if the defendants could have availed themselves of that omission, they could only have done it by plea in abatement; but having put themselves on the general issue, they had waved the objection.

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He admitted that, at common law, if *all* the obligors were not made defendants, or more than *one* of them were sued without the rest, in the case of a joint and several bond, it was error. But then it ought to be pleaded in abatement, and the objection cannot avail after imparlance, much less after a plea of "conditions performed."(*a*) Where some of the obligors are omitted in the declaration, the court will presume that they never sealed the bond unless it be pleaded in abatement. The defendant must shew that the obligor omitted is alive; otherwise it will be presumed that he is dead.(*b*)

(*a*) 5 Bac. abr. 164, 165.

(*b*) Allen's Rep. 21, Blackwell vs. Ashton.

But the statute ought to govern in this case. It was supposed formerly that the law did not authorise a suit against the securities, until a judgment had been obtained against the sheriff. As to the correctness of this idea, he did not, at present, mean to give any decisive opinion. The mode of proceeding against the sheriff being by *motion*, and that against the securities by *action* on the bond, it seemed to be contemplated that the judgment against the former should precede the suit against the latter. By resorting to the motion, in the first instance, in order to subject the estate of the sheriff, his securities were benefited, and therefore they ought not to object. It may be likened to the case of an executor's bond, on which a suit cannot be brought to charge the securities, until a devastavit has been established, by a prior suit, against the executor. In that case, the executor and his securities are jointly sued on the bond, because the first judgment being against the goods of his testator, he is not made personally liable. But, in this case, the sheriff is responsible, in the first instance out of his own estate. The law has, indeed, been changed, so as to give a motion against the securities, (R. C. Pl. edit. 137;) but judgment ought still to be first recovered against the sheriff. If it is asked how does it appear that the securities were charged with the amount of the judgment, as it is not stated in the declaration? It may be answered, that the auditor's account, shewing it, was filed; which account, both in the General Court, and in this court, is considered a part of the record, (2 Call, 512.) In this instance, it was, as much a part of the record as the bond, of which *oyer* was not taken; and in the petition for a supersedeas it is referred to as a part of the record.

Altho' the jury were not sworn *to try the issue*, but to *enquire of damages*, yet, in either case, they necessarily consider all the breaches assigned. (R. C. c. 76, s. 21.)

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The clerk had, indeed, been guilty of a slight informality in swearing them; but, after a fair trial on the merits, a mere clerical mistake ought not to vitiate the verdict. It is admitted, that on a writ of enquiry the jury must find for the plaintiff; but, if the merits had been for the defendants, only a cent damages, and costs, would have been given.

Wickham, in reply. The *Attorney General* admits that, on a joint and several bond, suit must be brought against *all* the obligors who are living, or any *one* of them; not against any intermediate number; but contends it is now too late to take advantage of this irregularity; and that the fact that one of the obligors had not been sued should have been pleaded in abatement. But where is the necessity of a plea in abatement, when it appears in the record? The plaintiff avers it in his declaration. He says that the defendants (now plaintiffs in error) "together with Gross Scruggs, &c." The authority cited by the Attorney General (5 Bac. abr. 165) only applies to matters *in pais*, such as would not appear upon the record without being specially pleaded. But it is said, it should be intended, that Gross Scruggs never executed the bond. If so, it is void; because being a statutory bond, it must be taken pursuant to the statute, or the treasurer cannot sue upon it. But in fact, Scruggs did seal, as the words of the bond prove. There was no necessity for the defendants to have averred that Scruggs was alive, because the record shewed it; and the rule of law is, that a person shall not be presumed to be dead. Nor shall it be intended that a judgment, on motion, because it might have been done, had been recovered against Scruggs. The right to obtain a judgment is no evidence that it has been done; and, in fact, it is denied that any judgment was ever obtained against him. Allen's Reports, 21, was upon demurrer, and is an authority in our favor. All the cases in the books are, that where the name of an obligor has been omitted in the writ and declaration, a *demurrer* would not lie. If the omission appeared upon *oyer* it was pleaded in abatement; if upon the trial only, and no *oyer* taken, it was inferred that the party had not sealed the bond.

It was not necessary first to bring a suit against the sheriff, before the securities could be charged. It is settled in the case of Call vs. Ruffin (1 Call, 333,) that the securities to a guardian's bond, are liable to an action without any previous suit against the principal. The

rule established in Braxton vs. Winslow (*a*), is founded on principles of law, which apply solely to the cases of executors and administrators.

The auditor's certificate is no evidence of a judgment, because not the best evidence; nor is it any part of the record. It has been repeatedly decided, that the mere circumstance of a paper's being copied and inserted among the records, does not make it a record, unless it legally constitutes a part. The practice spoken of in this case, has no weight. It is the practice to introduce merchants' accounts on the trial of a cause, yet they are no part of the record unless made so by an exception, demurrer, or the like. But because the court in the case of Branch and others against the Commonwealth, (2 Call, 510) speaks of the auditor's account as being in the record, it is contended that it is part of the record in the present case. This is unimportant. Nothing is more common than for plaintiffs in actions of debt upon bonds to file statements of the payments which have been made, but they do not necessarily form a part of the record. The petition for a supersedeas referring to the account, is no evidence that it is part of the record. If the opinion of the gentleman who drew the petition be taken at all, it must be taken altogether; and he explicitly states it as his opinion, "that there is sufficient error in the record to war-"rant a reversal of the judgment." It is also said that the account is as much a part of the record as the bond. It is a sufficient answer to say that the cases are quite dissimilar; the bond is stated in the declaration, which is not the case with the account. But if the account be a part of the record, the judgment ought to be reversed because it is erroneous. It charges an usurious interest, and exhibits as complete a system of *shaving* as was ever introduced in those towns in which banks are established.

(*a*) 1 Wash. 31, & in Call vs. Ruffin (1 Call 333) cited as Claiborne's executors vs. Spotsylvania Justices.

The question between the parties was whether there was a breach of the condition of the bond; but the only question before the jury was the amount of the damages which they were to find. It is said that swearing the jury on the writ of enquiry was a mere matter of form. It was indeed a common remark that a custom house oath was a mere matter of form, but he never heard it applied before to the oath of a jury. The error too was important; for some damages were necessary to be found; and a single penny would carry the costs.

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But it is asked, why did not the defendants object at the trial? We answer, because the error appeared on the record. An exception is necessary, only to introduce into the record something which would not otherwise appear upon it. This is said to be a mere clerical error, and according to the liberality of modern practice ought not to be resorted to, in order to defeat the justice of the case. To a Court of Appeals sitting to correct the errors of inferior courts, he would only say "that law is justice, and "justice is law." Let it be admitted that the error originated with the clerk; still is it such an error as can be amended? This is the test by which to try whether it is a clerical error or not. No amendment could go to shew that the jury tried an issue, when they were only sworn to enquire of damages.

Randolph, on the same side. In suits on common bonds for the payment of money, it is not so necessary for the principal obligor to be made a party, as in those on sheriff's bonds. None but the sheriff himself can perform the condition. His securities have neither power to act in the office, nor do they know any thing of the acts of their principal. If a judgment had been obtained against the principal, by motion, or action, an execution might have gone against his estate, and saved that of his securities.

The record proves that the cause was tried on a writ of enquiry. The entry is, "this day came the plaintiff, &c." (as is proper upon a writ of enquiry;) and not "the parties," which is the regular entry in the trial of an issue.

With respect to the plea of conditions performed, it has been repeatedly decided, that, although it is pleaded by the defendant, yet, if it appears there is nothing which he is bound to perform, he shall be discharged.

Cur. adv. vult.

On Saturday the 25th of October, the President delivered the opinion of the court, (present, Judges *Lyons*, *Roane* and *Tucker*,) that there was error in this, that the bond in the declaration mentioned being a joint and several obligation, and it being stated in the declaration that Gross Scruggs, one of the obligors, had executed the said bond by having acknowledged himself to be held and firmly bound with the other obligors in the said bond, and not being jointly sued with the other obligors, nor stated to be dead, the judgment against the other obligors is erroneous. The judgment is therefore reversed.

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TAYLOR'S Adm'r. *against* NICOLSON.

Friday, 24th October.

No calculations or grounds for an award, which are not incorporated in it, or annexed to it at the time of delivery, are to be regarded or received as reasons or grounds to avoid it.

If an award, which is good in other respects, contains a matter not mentioned in the submission; it shall not thereby be vitiated; but the additional matter ought to be rejected as surplusage.

ON an appeal from a decree of the superior Court of Chancery for the Richmond District, by which the bill, brought by the appellant to set aside an award, was dismissed.

The bill states that the appellant's intestate and the appellee were engaged in partnership in the "Manchester Mills," which they had leased for a term, unexpired at the death of the former; that by the articles of co-partnership, on the death of either partner, the survivor had the power of taking on himself the remainder of the lease, at a valuation to be made by persons, mutually chosen by him and the representative of the deceased; that the parties accordingly made choice of three gentlemen, to determine the value of the unexpired lease in *cash*; that those gentlemen awarded the sum of £595 8*s*. 10*d*. to be paid by the appellee to the appellant for his interest in the mills, *provided* the appellee obtained from George Mayo the lessor, a release in full of all claims which he might have on the appellant as administrator of his intestate; but if the appellee, when called on by the appellant, did not obtain such release, the award was to be void. A certificate from the arbitrators explanatory of the grounds on which they had made up their award, (shewing, that the sum at which the property was valued, arose from calculations of interest, at 10 per cent. per annum,) was obtained from them a few days after the award was delivered; and is filed among the papers, in the cause. It also shews that nine months were estimated as the time of payment, though the award itself is silent on that subject.

The appellee, in his answer, states that the appellant agreed to allow him nine months credit, on whatever sum might be awarded by the arbitrators; that, George Mayo had executed the releases required by the terms of the award; which he had always been ready and willing to perform.

The Chancellor dismissed so much of the bill, as prayed that the award might be set aside; and decreed the sum awarded with interest; after deducting the amount of the costs expended in defending the suit.

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TAYLOR'S Adm'r. *against* NICOLSON.

Bennett Taylor for the appellant. The award ought to be set aside, 1. because the arbitrators departed from the terms of the submission: 2. because the calculation made by them was usurious; 3. because it wanted mutuality.

1. The articles of submission state, that the valuation was to be in *cash:* but the certificate of the arbitrators, and the account annexed, prove that they allowed a credit of nine months, and a discount of ten per cent. for prompt payment.

(a) 2 Vern. 705, 3 Atk. 644, 494, 1 Wash. 156, 158, Pleasants, Shore and Co. v. Ross.

An award may be set aside for errors on its face,(a) and it surely is the same thing, if the arbitrators certify the principles upon which they proceeded, and it appears that they were wrong, either in law or fact.(b)....Much mischief might result from too freely admitting such explanations, but they ought not to be excluded altogether. For example, suppose the arbitrators should mistake the names of the parties, and insert A instead of B: it would be absurd not to permit them to explain their intention. A middle rule should be followed of neither too great laxity nor strictness. As in the case of *verdicts*, which are attempted to be disturbed on the evidence of the jurors, caution ought to be observed in setting aside *awards*. But where the evidence is unquestionable, as in this case, where all the arbitrators have joined in the certificate, and furnished both parties with copies, no danger could arise from receiving such certificate, and considering it a part of the award. The word "cash" in the submission necessarily excluded *credit*. We do not contend that the award is to be void, because that *word* was omitted; but because in fact credit was allowed. Could Nicolson, with the certificate of the arbitrators in his pocket, have been compelled to pay the money? It may be said, that ten per cent. was a compensation for the credit. But the arbitrators had no right to judge of this, and Nicolson might have set it aside on the ground of usury. The answer admits that nine months credit was allowed, but says that the plaintiff *agreed to it*, of which there is no proof: neither could it have been shewn by parol testimony, since the written submission was otherwise.

(b) 1 Wash. 158.

2. The calculation was usurious, circuitous and necessarily injurious to the plaintiff. See the president's opinion in the case before cited, 1 Wash. 158....The allowance of ten per cent. against the plaintiff was for the balance of the lease, being seven years; whereas the addition of 10 per cent. in his favor was only for nine months; and even that was to be deducted on payment of cash.

3. The award was not mutual, for it was obligatory on one party at all events, but was binding on the other only at his own election, and conditionally, there being a proviso annexed, not warranted by the submission. It depended on a release being obtained from Mayo, a stranger to the award, which circumstance is sufficient to overthrow it.(c) An award too must be final.(d) Now this award was not final, but might or might not be rendered so by Mayo's executing the release; and there is, in fact, no proof that this has been done.

(c) 1 Bac. 213.

(d) 1 Bac. 226.

The Chancellor says, the proviso was a nullity, and that an impertinent part of an award does not vitiate a good independent part. But here one part depended on the other, and the arbitrators conceived the release important. Was not the release really important? It must have influenced the estimate. But what right had the arbitrators, when nothing but the rent was in question, to require a release from Mayo of *all demands?*

Judge LYONS. Was not that for your benefit? 1 Call, *575*, Macon *vs.* Crump, proves that such an objection cannot lie.

Bennett Taylor. We did not want such a favor at their hands....1 Bac. 220, moreover proves that an award with a proviso is void.

Copland, for the appellee. As to the objection that the arbitrators inserted in their award a matter not mentioned in the submission, this cannot vitiate so much of the award as is good;(e) but the additional matter ought to be rejected as surplusage.

(e) 3 Mod. 309, Hill vs. Thorn.

With respect to introducing affidavits of witnesses, or certificates of arbitrators, not annexed to, or given at the *same time* with the award, for the purpose of explaining it, 1 Wash. 158, shews that any *improper conduct* in the arbitrators may be proved by affidavits, but *not errors in law or in fact.* A court cannot coerce arbitrators to give evidence of the principles upon which they acted; and, therefore, ought not to permit them to furnish certificates to alter or express differently their award from what it purports on its face. If they could do this, juries might certify in every case against their own verdicts. But, what is the cause of complaint? Was there any thing unconscionable done by them, even according to their certificate? By the original agreement, Nicolson was not to pay immediately. Seven years of the lease were yet to run; and a discount of ten per cent. was surely very moderate for cash, instead of so long a credit; to make a-

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mends for which, as far as was right, ten per cent. for the nine months delay of payment, was allowed to Taylor.

This question, however, is foreign to the present subject, for, notwithstanding the certificate given, no credit was allowed in the award itself, which was absolute and final, and might have been enforced immediately.

The award was not that a thing was to be done by a stranger to the submission, but that Nicolson was to obtain a release from Mayo. It was, therefore, not void on that account; but *so much of it*, being impertinent, was properly rejected by the Chancellor.

On Wednesday, October 29th, the president delivered the opinion of the court, (consisting of Judges *Lyons*, *Roane* and *Tucker*,) that no calculations or grounds for an award; which are not incorporated in it, or annexed to it at the time of delivery, are to be regarded or received as reasons or grounds to avoid it; that, therefore, there is no error in the decree which must be affirmed.

He farther observed, as his own opinion, that there is not the same strictness now in awards as formerly. The courts in England have relaxed; and they are benignly construed, to give them full effect, when there is no fraud in obtaining them. He cited 2 Wilson, 268.

Saturday, 25th October.

WIGGLESWORTH *against* STEERS and others.

A contract may be avoided by the legal representatives of a party thereto, on the ground of his having been drunk when it was made, altho' such drunkenness was not occasioned by the procurement of the other party.

THIS was a petition for a supersedeas to a decree of the Superior Court of Chancery for the Richmond District, pronounced in May last, affirming a decree of the county court of Spotsylvania.

The case was, that Steers, who was addicted to intoxication, and was drunk at dinner, (but not from the procurement of Wigglesworth as appeared from any of the evidence,) was prevailed on by the latter, about midnight of the same day, or, as some of the witnesses think, afterwards, (being still drunk,) to execute a bond for the conveyance of his lands in this state, in exchange for lands in Kentucky. Wigglesworth got possession of the lands of Steers, but never made any conveyance for those in Kentucky, though he frequently expressed his willingness to execute a deed, whenever he should obtain one from Steers, but which was never done. In this state of things Steers died, intestate; and a bill was brought by persons

claiming to be his heirs at law to vacate this bond, stating the circumstances of the contract, and suggesting that it was not in the power of Wigglesworth to make a good title to the land in Kentucky, designated in his bond: the bill also prayed for a re-delivery of the land, of which Wigglesworth had got possession, and for an account of the profits. One of the witnesses proved that the contract was made in the morning, while Steers was sober, but another stated that Steers was called on by Wigglesworth to bargain about the land, after dinner, and when he was evidently drunk; and all the witnesses agreed that he was drunk when it was consummated by his entering into bonds. The person who drew up the writings, declared that he did it with reluctance, believing that Steers was drunk at the time, and also, that it was after midnight, (and if so, Sunday morning,) when they were executed; that a stranger, who was present, urged the impropriety of closing a bargain of consequence at so unseasonable a time; that the witness "discovered a backwardness on "the part of Steers, and a forwardness on the part of Wig-"glesworth," in completing the contract.

The court of Spotsylvania decreed the contract to be annulled, and that Wigglesworth should re-deliver the land to the complainants, but without any account of profits. On an appeal to the Superior Court of Chancery, this decree was affirmed.

Botts moved for a *supersedeas* upon the following grounds....1st. that upon the face of the bill, the plaintiffs had a plain and adequate remedy at law, upon a question purely legal; without any one circumstance to give jurisdiction to a court of equity....2d. that the bill charging "that the three complainants were heirs at law to Abel "Steers....that he died leaving neither children nor father "or mother, nor brother to your orator, whereby they be-"came heir at law to the said Abel," made out too imperfect a title under Abel Steers to warrant a decree,.... and if a decree could be founded on such a bill, with proof of its verity, that proof is not furnished, although the answer denies their right of inheritance....and, 3d. that Steers was not drunk when he made the contract, though he was when he consummated it; and that, if he had been intoxicated without the procurement of the defendant, the contract could not be avoided....Powell on Contracts, 29, 30.

The Court, (*Lyons*, *Roane* and *Tucker*, Judges,) denied the supersedeas; conceiving that under the particular cir-

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cumstances of this case, the rule stated from Powell, would not be infringed thereby; that the bill was sustainable on the ground of vacating the bond; and that on both grounds the decision of the court seemed warranted by Reynolds vs. Waller (1 Wash. 164,) and other cases.

Thursday, 30th October.

FORD *against* GARDNER and others.

Where, on a trial by jury, the evidence adduced does not appear on the record, all must be presumed to have been legal and right.

THOMAS GARDNER and others, next of kin to Mary Gardner, deceased, filed a bill in chancery in Louisa county court, against Francis Ford, alledging that he had by undue means procured a writing, purporting to be the last will of the said Mary, and bequeathing to him her whole estate; which had before been offered for probate in the county court, and rejected, but on an appeal to the District Court of Charlottesville, admitted to record. The defendant filed an answer, averring that the will was duly executed. The depositions of nine witnesses were taken in behalf of the plaintiffs, and five for the defendant; and, altogether, clearly proved that the will was not duly executed, and that Ford was guilty of a gross fraud in preparing it, and offering it to her to be executed, when she was out of her senses.

Upon an issue from a court of chancery to try the validity of a will, the court ought to give directions respecting the reading of the papers filed in the cause: otherwise, the omission to read any of them on the trial of such issue will not be a ground for reversing the proceedings, if the court of chancery refuses to grant a new trial.

The cause standing for hearing, an issue was directed to try the validity of the will on the law side of the county court. A declaration was drawn, stating a wager that the paper purporting to be the will was not valid; and issue was joined upon the plea of its being valid. The verdict was "We of the jury find that the paper called a "will, &c. is not valid." Upon a motion to the court, in behalf of the defendant, to certify that the evidence was in his favor, the court were divided. At the succeeding term, a motion was made for a new trial, which being refused by the court, the defendant filed a bill of exceptions, stating as the grounds of his motion, 1st the division of the court above-mentioned; and, 2d that the answer had not been read to the jury, the counsel at the bar having said it was settled at the District Court, that it should not be read in such cases, in consequence whereof it was not offered to be read. The court entered a decree declaring null and void, the paper purporting to be the will of Mary Gardner. The defendant, Ford, appealed; and, the decree of the county court was affirmed

When the verdict, in such a case,

by the High Court of Chancery; from whence he appealed to this court.

Randolph, for the appellant. I admit that the depositions in this case are against my client; but they are unimportant as to the questions which I mean to discuss.

The first point I contend for, is, that the will having been tried in the county court, and, on an appeal to the District Court, admitted to record, the parties, (if desirous of carrying the contest farther,) should have appealed to this court, instead of bringing their suit in chancery. The county court in chancery could not annul a will which a superior court of law had admitted to record on the same evidence as that before them. The words of the law, I admit, are ambiguous, (R'd C. c. 92, sec. 11;) but their *meaning* appears to be, that, where a will has been admitted to probate, any person interested, who had *never appeared before* and contested it, may, within seven years, *appear* and file his bill in equity; but that, where the will was contested, when offered for probate, the decision should be final.

In this case the will was contested in the county court, in the first instance, and rejected; but that decision was afterwards reversed by the District Court, and the same will admitted to record. I acknowledge that the proceedings on the probate are not a part of this record, but they ought to have been; and a *certiorari* for a more complete record should be awarded.

Wickham. The case of Williams vs. Strickler, 3 Call, 230, proves that a certiorari cannot be awarded from this court to supply any omission in the county court record.

Randolph. However that may be, I shall contend there is enough in this record to shew that such proceedings had existed. The bill expressly states that the will had been contested in the county court, and established in the District Court. Wyld vs. Ambler, 2 Wash. 42, shews that no county court can enjoin the judgment of a District Court. It follows therefore, by analogy, that a will proved in the latter cannot be annulled in the former.

My second objection is that the *issue* did not literally comply with the law. It should have been joined on the point, whether the paper in question was the will of Mary Gardner or not; instead of which, it was, whether the will was valid or not. In this case an express law dictates particular words to be used in making up the issue, and therefore ought to be strictly followed. Issues at com-

is certified to the court sitting in chancery, and a new trial refused, the allegations relative to what passed at the trial stated in a bill of exceptions to the opinion of the court in refusing the new trial, if no proof of the truth of those allegations appear on the record, are not to be taken as admitted to be true by the court's signing and sealing.

After the probate of a will, any person interested, who had not appeared and contested such probate, may, within seven years, file a bill in equity to contest its validity: and any such person, even tho' he had appeared & contested the probate, may

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mon law, such as *non assumpsit*, *nil debet*, &c. being the creatures of the courts, may be modelled by them according to their discretion; but the express words of a law cannot. In England, in cases of this nature, the issue is *devisavit vel non*, and synonymous words are rejected. It may be said that to try the validity of the will, and whether the paper be the will or not is the same thing. But the great object is to avoid vague expressions, which may be misinterpreted; for juries might understand the validity of the will to depend upon the question whether the dispositions of property made in it were reasonable in their opinions. The strictness I contend for may appear to be too great, but is the more necessary, since the verdict is final, and if a single objection is deemed sufficient by the jury, the will is annulled; but, unless every thing concurs in its favor, it cannot be established. Besides, where real and personal estates are both conveyed by a will, (which was the case here) a jury might think, if it was invalid as to one, it was invalid as to the other. To prevent mistakes, therefore, as to the grounds of decision, strictness in the words of the issue was necessary.

file a bill as aforesaid, on the ground of a fraud, to the existence of which he was a stranger at the time of the probate.

Notwithstanding a will has been admitted to record in a district court, a county court in chancery has jurisdiction to try its validity.

As to the points made in the bill of exceptions, I shall not press that concerning the division of the court; but the failure to offer the answer in evidence is important. The court by signing the exceptions admit the fact that the answer was not read. But, this being a suit in chancery, the answer was an important document, and ought to have been read. When an issue is directed by a court of equity, all the papers ought to be read to the jury. The answer, particularly, as it may be evidence against the defendant, should be evidence for him, where it is responsive to the bill. A trial to satisfy the conscience of a court of equity ought to be fair, and conducted with full discussion, and great liberality should prevail in granting new trials....(Pickett vs. Morris, 2 Wash. 273.) Even the misapprehension of counsel is a good ground in a court of equity for a new trial. Such was the case in this instance, and very probably the opponent counsel led to the mistake by giving it as their opinion, together with that expressed by the rest of the bar, that the answer could not be read. It may be said, that, upon the merits, the evidence is against us; and that therefore these objections should be disregarded. But it does not appear that the depositions transcribed into the record were all the evidence before the jury. They might have had verbal evidence before them, adduced on both sides, and the an-

A county court sitting in chancery has a right to direct an issue to be tried on the common law side of the same court.

An issue to try the validity of a will has the same effect with an issue to try whether the writing in question is the will, or not.

swer might have been all-important to turn the scale. But at any rate, it ought to have been heard, as the jury were to judge of it, and their verdict was to be final.

Hening, for the appellees, The first point intended to have been made by the counsel for the appellant, "that the "cause could not be directed by the county court of Lou- "isa on the chancery side, to be tried in the same court "on the law side," has, with great propriety, been abandoned: for it might be shewn both from principle and practice, that this ground was untenable. A county court, having both chancery and common law jurisdiction, may entertain a bill brought for the purpose of setting aside a will; but as the validity of a will can only be tried at law (a), and the county court has no power to send an issue at law to be tried before any other court, it necessarily follows that it must be tried at its own bar, on the law side. The High Court of Chancery may, indeed, direct an issue to be tried before any court whatever; because it is expressly authorised by statute (b). But no such power is given to the county courts; and the uniform practice has been to direct issues to be tried in their own court on the law side.

(a) 2 Atk. 424.

(b) R. C. p. 54.

The court of exchequer in England, which is analogous to our county courts, in point of jurisdiction, always sends a matter of fact from the equity side, to be tried on the law side of their own court. (c)

(c) Imp. prac. K. B. 487.

But a new point has been made; "that after the will "had been contested, before the District Court, on the "question of probate, a bill could not be brought in the "county court to try its validity:" and the word *appear* in that clause of the act of assembly, which speaks of the probate of wills, has been relied upon as favoring this position. From a fair exposition of this act (d), it will be seen that the first part of the clause has relation to the probate of the will only; which is generally considered a mere matter of form, and which, from its nature, must often be an *ex parte* proceeding. The subsequent part of the clause expressly authorises any person interested, if he shall appear within seven years afterwards, to file his bill in equity and contest the validity of the will. The word appear, cannot apply to proceedings as to the probate, either in the District Court or the county court, on the law side: for how can a party appear, by a bill in equity, in a court of law? An unanswerable argument against the position, that the judgment of the District Court was final, is, that that court had no power to direct

(d) R. C. p. 161 sec. 11.

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an issue to try the validity of a will before a jury. And where evidence is complicated, and contradictory, as in this case, a jury alone is competent to decide on its weight. As to the objection that a county court cannot take cognizance of a will after it has been before the District Court, it is sufficient to say, that the county court has chancery jurisdiction, which the District Court has not, and that the law authorises it. But, to all the objections urged by the counsel for the appellant as to the want of jurisdiction in the county court, one answer may be given; that the appellant himself went to trial on the issue directed, without filing any demurrer or plea in abatement to the original bill. After this, it is too late to aver a want of jurisdiction, even if there should be a doubt on that subject.(a) The verdict of the jury, "that the will was not valid," has also been considered insufficient. On this point many authorities might be adduced, but two only are sufficient. In *Trials per pais*, 298, it is laid down, "that if the "matter and substance of the issue be found, it is sufficient; and in 2 L'd Raym. 860, Tonkin vs. Croker, it is held "that after verdict the court will admit any intend-"ment to make the case good." In the present case, it is contended that the issue should have been in the words of the act of assembly, "whether the writing be the will of "the testator or not." The issue was, "whether the will "was valid or not;" and the jury have expressly found "that it was not valid." Under this finding of the jury, the court will intend that the writing did not possess those requisites, which would make it the will of the testatrix.

(a) See R. C. pa. 91, sec. 56.

But it is said, that the county court ought to have directed a new trial of the issue, because on the question to certify as to the weight of evidence, the court was equally divided; and because the answer of the defendant in chancery was not read on the trial of the issue at law. To grant a new trial of the issue was entirely at the discretion of the court; and after a jury, weighing the contradictory evidence in the cause, had decided against the will, the new trial was properly refused. It is denied by the appellees that any objection was made to reading the answer of the appellant, on the trial of the issue; nor does it judicially appear to this court, that it was not read. The issue was tried at the August term, on the law side, and certified to the court in chancery, at the November term following; and then for the first time, an exception was improperly taken before the court sitting in chancery, to an opinion declared by a court of law, at a former term,

Exceptions, to be valid, must be taken at the trial, and not after verdict (*a*); and are only proper to bring into the record some opinion of the court, or some matter, which would not otherwise appear in it. The division of the court *did* appear upon the record, and the fact of omitting to read the answer not having been stated at the trial, neither ground was sufficient to warrant a bill of exceptions at the time it was taken.

(*a*) Bull. N. P. 315. & 1 Salk. 288, Wright vs. Sharp.

Wickham, on the same side. Mr. Randolph's first point is not properly before this court, as the proceedings in the county and District Courts are not inserted in the record; but, supposing they were, the conclusion he has drawn is incorrect. The act of assembly,(*b*) has altered the mode of proceeding at common law relative to probates. At common law the commencement of the probate is by a summons, which must be executed on all the parties interested, who must be before the ecclesiastical court before proof of the will is received. But, by this act, the county court may *admit the probate immediately*, and any person interested may file a bill in chancery, and have the *validity* of the will tried by a jury within seven years thereafter. The plain meaning of the act must be that this may be done, notwithstanding it was contested on the probate; for which there is a very good reason; that the parties contesting might not at the time have been fully prepared with testimony, not having had notice by a summons, and the probate being *allowed immediately*. In this case particularly, some of the parties are *feme coverts* and infants, and there is no proof that they appeared in the county court. Ford was the appellant from that court to the District Court. His giving an appeal bond to the parties interested does not prove that they appeared, or, if an appearance was entered in the District Court record, that is no proof that *all* the present parties appealed; and, if any one of them failed to appear and contest the will on the probate, *that one* by the express words of the act had a right afterwards to bring a suit in chancery within seven years. However, if the previous contest in the county and District Courts precluded the bringing this suit, Ford ought to have pleaded that circumstance in abatement; and, as he did not, it is presumable that the records of those courts would have shewn nothing in his favor.

(*b*) R. C. c. 92, s. 11, 12.

It is objected that the county court could not annul the judgment of the District Court, which admitted the will to record. But this argument applies as forcibly to the

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case of a county court in chancery annulling a will of which a probate has been had before a former county court. In this there is no clashing of jurisdictions; as the decision is made upon different or additional evidence, and the probate is not intended by the act of assembly to be conclusive. The case of Wyld *vs.* Ambler is against Mr. Randolph; for the question here is not to reverse or annul the judgment of the District Court, (which the county court could not have done;) but to decide whether the will was obtained by fraud and forgery. We do not say that the District Court did wrong, but that they very properly left us to our bill in equity, which could not be received by themselves, and therefore was filed in the county court. It may be objected that the suit ought to have been brought in the High Court of Chancery. If I considered only my own interest as a lawyer, I might be in favor of this doctrine; but I can see no necessity for confining the suit to the High Court of Chancery; as, for the reasons already given, the authority of the county court was not set up against that of the District Court.

All these objections, however, are in substance, pleas to the jurisdiction, and are now too late, as they were not filed in the first instance. The motion for a *certiorari* is equally too late, for no such motion was made to the Chancellor; and can this court reverse his decree, when it is evident that he did right on the record before him? The controversy concerning the words of the issue is without foundation. There was an acquiescence in the words used on the occasion; for no objection was made, and, at the worst, it was only *informal*, and, being substantially good, ought not to be disturbed. But, in fact, the issue was formal and good. No set form of words is prescribed in the act of assembly, nor in England, where sometimes it is *devisavit vel non*, and sometimes a wager is laid and the issue is joined on the plea of *non assumpsit*. The only question in such cases is, whether the jury had the *merits* before them.

Judge TUCKER....What evidence is there that the *will* was before them, and, if not, how could they have decided upon it?

Wickham. The will must have been before them, by a subpoena *duces tecum*; or a copy was received by consent, and at any rate it was sufficiently identified by the bill and answer. There is no necessity for the *original* will's being before the jury, unless demanded by the par-

ties; and, as no exception was taken, it is to be inferred that it was there. In this case especially it was not wanting. The question here was not about the contents of the paper, but whether Mrs. Gardner was in her senses or not. The practice of the country is in favor of this position. The Chancellor directs the issue to be tried at the bar of any court he pleases, and it never appears by the record whether the will was before the jury or not, unless an exception is taken. Indeed, *this court* has often sat on probates, and never had the original will before them but in one instance. The objection concerning the division of the court is given up. M'Call *vs.* Graham in this court is conclusive upon that point. The exception that the answer was not read was not made at a proper time; and if the answer could lawfully have been read, it was his own neglect that it was not. But, I contend that the answer ought not to have been read. The only instance where an answer is to be read to the jury is where an issue is directed on an *equitable* point to inform the conscience of the Chancellor; not, in this special mode of proceeding under the act of assembly. For a man might forge a will, and afterwards, if his answer could be received as evidence, support it by his own oath. Buller's N. P. 238 and 285, and 12 Viner 88, shew that the answer ought not to be evidence, except where a discovery is prayed.

Judge TUCKER....Does not this bill pray a discovery?

Wickham. It is in the usual form, praying the defendant to answer, &c.; but it is not a *bill for discovery*; because other evidence was relied upon, and not the oath of the defendant. Altho' *in form*, a discovery was required, yet, in substance, it was intended only to have the question tried under the act. But, on the *merits*, the answer was unimportant, and could have had no effect; being expressly contradicted by nine witnesses. The observation, that there might have been other evidence, which does not appear, has no force; because, if there was, Ford ought to have stated that fact in his exceptions; for exceptions of this sort ought to state all the evidence.

Randolph, in reply. The real subjects of enquiry in this case are, 1. Whether, after the probate in the District Court, an issue could have been directed to try the validity of the will....2. Was the issue properly expressed?....3. Ought not the will to have been before the jury, and was it there?....and 4. Is there not proof that the

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answer was omitted to be read, and ought not relief to be given for that omission?

1. I contend that, after the probate in the District Court, the issue ought not to have been directed. The general rule is that the judgment of a District Court must stand, unless it be reversed by a superior tribunal. To this rule I grant that exceptions may be made by special laws: but in this case there is none.

The fact that the present appellees did appear and contest the will is not established by positive proof, but may be fairly inferred from the record. A strong presumption arises from the circumstance that the bill does not complain of the will's being admitted to probate in their absence. The appeal to the District Court proves that there were parties contesting before the county court, since there cannot be an appellant without an appellee. That some of them were infants and feme coverts is a point of no consequence; for they were represented by the rest, and their appearance binds them, unless collusion be proved; for it would be ridiculous to permit twenty distributees one after another to bring suits to try a will. If so, and different verdicts should be given by the juries, would the majority of those verdicts prevail? Or is a will to be established against some and not against the rest? The objection that some of them might have been accidentally present, and only asked questions, without being prepared fully with evidence, cannot prevail: because, if that was the case, they ought to have carried it farther; and to the last decision upon it in the Court of Appeals, an opportunity to introduce their witnesses would have been furnished. If any one, therefore, was present, and asked a single question, he was liable for all the consequences of not carrying the contest farther. It is asked, why did we not plead this fact in the Court of Chancery? I answer because the contestation was apparent in the bill itself. If it was not sufficiently evident, the Chancellor ought to have caused all proofs for satisfying his conscience to be brought forth; and, as no such measures were taken, the maxim, *quod stabitur praesumptioni donec probetur in contrarium*, applies.

As to the law arising on that fact;...the obvious interpretation of the act of assembly supposes non-appearance and non-contestation. Its words are, "if, *however*, any "person interested shall within seven years afterwards "*appear, &c.*" Here the word *however* is synonymous

with *notwithstanding*, and means something contrary to what had been before done; implying that, if any person, *who had not appeared at the probate*, shall within seven years afterwards *appear*, &c. Reason and justice are in favor of this construction; because, in cases where the parties have appeared at the time when the will is offered for probate, the suit in chancery is unnecessary, the whole subject of law and evidence being open upon the appeal; the court examining witnesses, and deciding upon the *merits* of the question. If the *merits* were not before the District Court in this case, they might and ought to have been. Besides, why should twenty chances of annulling the will be given to those opposed to it, and only one of supporting it to the other party? According to that doctrine, even if the contest had been carried up to the Court of Appeals, a suit in chancery might afterwards have been brought.

Mr. *Wickham* has mistaken the practice in the ecclesiastical courts. The practice of filing a *caveat* to prevent letters of administration from being improvidently issued proves that, otherwise, the parties would be bound by the first examination. But the doctrine on that subject has no application to the present question. Our new law, passed in 1785, and transcribed in 1792, was not intended to guard, (as they do in the ecclesiastical courts) against precipitate proof, by requiring parties to be summoned before they should be bound by the probate. The act of 1748 ch. 3, s. 4, directed the heir to be summoned where the lands or any part thereof were devised away from him; but did not require the *distributees* in any case to be summoned. An appeal was their only remedy, except in cases of disability by infancy, &c.; in which an *application* to the court was allowed within ten years after the disability removed; and yet, under that law, no injustice was ever complained of. The suit in chancery to try the will was introduced by the act of 1785, to give relief upon principles of *equity only*; namely, where the complainants were undefended, having not appeared and contested. But it is objected that the decision of the District Court ought to have been pleaded in abatement or bar. I ask, is this a regular suit in chancery, or not? If it is not a regular suit, but only so in *form*, for the purpose of having the issue directed to try the will, then the law of abatement does not apply. If it is a regular suit, the bar is apparent from the bill itself; the court could

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have no jurisdiction but by virtue of the act of assembly, and, that failing to bestow it, their jurisdiction failed. The rule is that, where in any shape it appears that the court had no jurisdiction, it is immaterial whether it be pleaded or not.

2. The issue and verdict thereupon were improper for the reasons I have assigned before. Besides, the bill does not pray an issue to be awarded, and the prayer for general relief is not sufficient. Our acquiescence, by joining in the issue afterwards illegally tendered, cannot preclude us from contesting it now; because Ford was compelled to accept it, in submission to the authority of the court.

3. The will was not before the jury; because, having been recorded in the District Court, it could not have been before them but by a *subpœna duces tecum*; which is not to be presumed, as it does not appear in the record. It is indeed very questionable whether the clerk of the county court was authorised to issue such a writ to the clerk of the District Court, the latter being an officer of a superior court. It is said, however, that the presence of the will was not necessary. But, since the jury were to judge of its *validity* in *every respect*, as well whether it was attested by the legal number of witnesses, or the signature was genuine, as whether it was fraudulently obtained, they could not have done so without having it before them. The court also, without inspecting it, could not have been enabled to decide properly the motion for a new trial. And how can this court determine whether they did right or wrong? But it is pretended that the parties dispensed with it. I deny that this was done by Ford. The Gardners indeed, who sought to destroy it, ought to have caused it to be produced, and should have set it forth, as an exhibit annexed to their bill.

4. The omission to read the answer was a sufficient ground for a new trial. Our opponents object, 1. that the fact of the omission is not proved; 2. that, if it had been read, it could not have availed; and 3. that, if it was omitted, it was thro' the fault of the counsel of Ford himself. To the first objection, I answer, that the bill of exceptions states the fact of omission, and must be taken as a certificate from the court themselves of its truth....1 Salk. 288, which has been cited to shew that exceptions, to be valid, must be taken at the trial, speaks only of a regular bill of exceptions, after the cause has been decided, not while the suit is still depending.

Judge LYONS....How could the court, to whom the motion for a new trial was made, know the fact of the omission at the former court?

Randolph. The Judges in the county court in chancery and at common law are the same persons; and, if the court on the chancery side undertook to assert this from their own knowledge, who can control it? But, admit that this is not a true bill of exceptions; it, nevertheless, contains matter, especially when backed by the circumstance of the court's being divided on the weight of evidence, which ought to be noticed on a motion for a new trial in a court of equity, where mere affidavits are often considered as sufficient.

2. If the answer had been read it might have availed; because it is the general rule in equity that it shall be read, and why did the law direct the suit to be brought in *chancery*, if chancery rules are not to prevail? Every reason is in favor of this, because, after attempting to obtain a discovery from the defendant's oath, the plaintiff ought to abide by it. His being charged with forgery is immaterial; for, if he was guilty of that crime, prosecute him at common law; but, when you bring him into chancery, let his answer be read. And the charge in this case, as in others, ought not to be presumed until proved. The issue was founded on the *bill*, *answer* and *depositions*. Buller's N. P. 238, shews that the depositions could not have been read without first reading the bill and answer. By what right then did they read the depositions? The answer is, because written evidence is admitted *in chancery*. If, therefore, the rules of chancery prevailed in part, why not *in toto?* Besides, the *final hearing* in such cases is upon the bill, answer and exhibits. Is it not absurd to introduce the answer on the final hearing, when it can have no effect, after the verdict has decided the question, and not admit it in the first instance, altho' it might then be of use and was a part of the record? 12 Viner 88, and Buller 237, do not apply to this case. The necessity of reading the answer is farther evident from this consideration, that the evidence of the *place* where the will was signed was introduced against it. The answer might have removed that difficulty. There was, moreover, conflicting testimony, and you cannot select a particular point and call it fatal. The will would have been good as to personal property without much solemnity; and the answer implies its perfect execution; so, at least, the jury might have understood it. In addition to all this, when

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the character of a man, who has hitherto supported a good reputation, is in question, surely, his answer should be admitted to be read in his vindication, to have such credit as the jury may think it deserves.

3. Pickett vs. Morris, 2 Wash. proves that an omission by the counsel on one side, when occasioned by a misrepresentation made by the counsel on the other side, is a ground for a new trial.

Tuesday, Nov. 4th. The president delivered the opinion of the court, (present, *Lyons*, *Carrington* and *Tucker*, Judges,) that the decree of the High Court of Chancery should be affirmed; and observed that, for the information of the bar, he would state the principles upon which that opinion was founded.

Having stated the case, he proceeded as follows:....

It does not appear what evidence was given to the jury, and, as no exception was filed at the trial, all must be presumed to have been legal and right.

In the exceptions, which were filed at a subsequent term, no proof of what is said to have passed between the counsel at the bar is stated, but it appears to have been merely a suggestion of the counsel who drew the exceptions. The court therefore did not and could not err in refusing the new trial, when the answer had not been offered to be read. As no direction from the court sitting in chancery had been given, respecting the reading of the depositions or any of the papers filed in the cause, the omission to read any of those documents was unimportant, if, in fact, there was such an omission.

The original will might have been produced at the trial; and, as no exception for the want of it was taken, must now be presumed to have been before the jury.

The heirs and distributees are not summoned, under our act of assembly, to contest a will when it is offered for probate. The persons interested in this instance therefore, not being summoned, knew not when the will would be exhibited to the court, and the probate could not be binding upon them. Some of them might have been by accident in court, and contested the will, but that could not bind others who were infants, &c.; nor is the probate binding or conclusive on any of them, who might be strangers then to the fraud, and have discovered it afterwards. The true construction of the act of assembly is, that, if the fraud be discovered within seven years after the probate, any person interested may by bill in chancery contest its validity upon an issue to be made up,

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whether the writing produced be the will of the testator or not. Validity means certainty; and certainty truth; so that the issue was whether the paper in question was the true will or not.

The county court in chancery had a right to direct a trial of such an issue, as well as the High Court of Chancery, and the judge of the last mentioned court, altho' tenacious of his jurisdiction, was of this opinion; or he would not have affirmed the decree.

The case of a deed's being proved in the General Court is analogous to the present. A county court is not thereby precluded from enquiring in chancery into any fraud committed in obtaining such deed, and from setting it aside: nor, altho' a *will* has been proved in a superior court, can the county court in chancery be prevented from annulling it for fraud.

The court therefore is of opinion that the decree be affirmed.

KEMP *against* the COMMONWEALTH.

Friday, 31st October.

The act of limitations will not bar a motion, in behalf of the commonwealth, against a person who has received public money & is accountable for it.

BY an act of assembly, passed in 1786, intituled, "an "act to amend the act for ascertaining certain taxes and "duties, and for establishing a permanent revenue," the compensation to the commissioners of the revenue was changed. In consequence of a construction put on that act, several commissioners drew the £20 per annum which had been allowed prior thereto. An act, passed in 1790, referred it to the General Court to decide whether, subsequent to that of 1786, the commissioners were entitled to the £20 per annum; and directed, that, in case of a decision against them, legal proceedings should be instituted to compel those, who had received it, to refund. The General Court were of opinion that the commissioners had no right to the sum in question; and their decision was affirmed by the Court of Appeals. The present case was that of a motion against Peter Kemp, commissioner of the county of Middlesex, to compel him to refund the sum which, under the aforesaid erroneous construction, he had received. The only defence relied on at the trial, was the act of limitations, which was overruled by the court, and a judgment entered in favor of the commonwealth; to which judgment Kemp obtained a writ of supersedeas.

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Wickham, for the plaintiff in error. The point for which I contend is, that the commonwealth is barred by the act of limitations, although not specially named. The case of Gaskins vs. the Commonwealth, (1 Call, 194,) proves, that an individual cannot obtain a supersedeas against a judgment on behalf of the commonwealth after five years have elapsed since it was rendered. The commonwealth may therefore plead that act against an individual, though no express provision exists in its favor. Why then should not the individual be permitted to plead it against the commonwealth? Even the odious doctrine of *nullum tempus occurrit regi*, which prevails in England, does not authorise the king to plead the act of limitations against a subject, who is not permitted in the same case, to plead it against the king. The maxim there is reciprocal, and ought to be so here, if it applies at all.

It may be said, this is a motion. But the case of the Auditor vs. Graham, (1 Call, 475,) shews that the act of limitations extends to a motion; and Lee vs. Peachy, (3 Call, 220,) does not differ from that in principle; the distinction being, that, in the latter case, there was a bond given by the sheriff, which prevented the act of limitations from barring the motion. Besides, the varying the form of action, for example, giving a summary remedy by motion, instead of debt or assumpsit, does not change the right of the parties to avail themselves of any plea before allowed. That it is not necessary to extend the act of limitations, by an express provision, to cases coming within its spirit and meaning, is evident from the circumstance, that no express law applies that act to suits in chancery: yet there it may be pleaded. This is done every day, on the principle of analogy, which operates with equal force in the present case.

Attorney General, for the commonwealth. The first position which I shall lay down is, that the act of limitations does not extend to motions in behalf of the commonwealth. No maxim of the common law is more firmly established, than *nullum tempus occurrit regi*. (*a*) This principle is considered not merely personal as a matter of prerogative, but as applicable to all cases of debts due to the government, in which the king's name is used for their recovery. No instance can be adduced in which the act of limitations has been allowed against a public demand; nor can any act of the legislature of Virginia be found altering those principles of the common law. The revolution, it is true, produced an important change; and

(*a*) 1 Bl. Co. 247,

many of the regal powers and prerogatives ceased, as inconsistent with the nature of our government; but there certainly were some rights appertaining to the English government, which were transferred to the commonwealth, either by the silent effect of the revolution, or by express provisions in the constitution. Thus the constitution prescribes that all escheats, forfeitures, &c. heretofore going to the king shall go to the commonwealth. To prevent the operation of this principle, the legislature found it necessary to pass a law, declaring that no attainder or conviction of treason, felony, &c. should work a corruption of blood or forfeiture of estate. (a) So also the commonwealth releases her right to all lands after thirty years possession; which is a legislative exposition of the principle that no limitation would bar the commonwealth. (b)

(a) R. C. p. 106.

(b) R. C. p. 378.

If the foregoing positions are correct, it may be asked, where is the law, which declares that the act of limitations shall run against the commonwealth? It is but reasonable to require the counsel for the plaintiff in error to produce it, when a great and important principle is to be changed. In the act for the limitation of actions (c), no expression can be found shewing that it was intended to bind the commonwealth. The framers of that law, knowing the common law principle, would certainly have declared in express terms, that it extended to the commonwealth, if such was their intention. In the case of Bedinger vs. the Commonwealth (d), this court refused to extend its jurisdiction, by implication, to appeals in criminal cases, in which the commonwealth was a party.

(c) R. C. p. 107.

(d) 3 Call, 461.

In none of the cases which have been cited and relied upon, as favoring the plaintiff in error, has the question whether the commonwealth was bound by the act of limitations ever been raised. Gaskins vs. the Commonwealth (e), turned upon the point, whether the Court of Appeals could grant a writ of supersedeas to a judgment of the General Court, after five years. In the case of Graham and the Auditor (f), the question was, whether the act of limitations would bar the recovery of a fine. The court decided that it would. The language of the law, as to the limitation of penal actions, necessarily applies to the commonwealth; because it speaks of indictments, informations, &c.; but no such expressions are inserted in the general act of limitations.

(e) 1 Call, 194

(f) 1 Call, 475

But if it should be thought to extend to the commonwealth in general, it would not in this particular case. The limitation of actions did not exist at common law,

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but is entirely statutory; consequently the act is to be strictly construed, and not to extend to any actions unless particularly named (*a*). This act does not bar a right, but the remedy only; and if the party can pursue his remedy in any other form, the act shall not prevent him. Its provisions are never extended by analogy (*b*).

Whenever a remedy arises from a statute, as in this case, the act will not run (*c*). Courts of equity were not bound to adopt it, but did so merely on the principle of expediency, and did not apply it to cases of trusts. And if this court were authorised to admit the operation of the act by analogy, still it would not run in this case, because the money having been received by the plaintiff in error, under an erroneous construction of the law, he would be a trustee for the commonwealth.

(*a*) 4 Bac. abr. Gwil. edit 461. 2 Inst. 95.

(*b*) 4 Bac. 463, 469, 471.

(*c*) 4 Bac. 471, 472.

Wickham, in reply. The first and most important point on which the Attorney General depends, is, that the doctrine arising from that branch of the king's prerogative expressed in the odious maxim of "*nullum tempus occurrit regi*," now applies to the commonwealth. But I shall contend the contrary, because the reason which gave birth to it, no longer exists. That maxim in England is founded on the pretence that the king's mind is so completely occupied with the cares of state, that he has not time to attend to his own private affairs. It was therefore supposed to be unjust to subject him to the operation of the act of limitations. This branch of his prerogative, of course, grows out of the king's natural or personal character, and cannot belong to the commonwealth of Virginia, which has no private affairs, but has able and vigilant officers to demand and recover all its just claims. It is said that this doctrine is in England extended to debts due to the king in his public capacity: but the cause of this is easily explained. Its origin, in that country, was in ancient times: when it was first established all the revenues of the crown were considered as the individual property of the king: when the parliament granted a subsidy, he disposed of it as his own money; and all debts due to the government were regarded as belonging to him in his private capacity. The reason therefore which originally existed for exempting the king from the act of limitations, has ceased to have any application in modern times; yet through a servile adherence to authority the maxim has continued in force; but, if it were now introduced for the first time, it would not be countenanced by the courts of England, whose judges, in reality, lean a-

gainst it as far as they are able. Legislative expositions since this suit was brought cannot be admitted to explain how far the commonwealth is bound by the act of limitations. But the case of lands, concerning which the legislature has made a provision, is not similar to that now in question; because, as the commonwealth was the original proprietor of all the territory of the state, it was doubtful whether she could ever be considered as out of possession of lands for which no grant had issued. It therefore became necessary in that case to provide a limitation against her.

But it is said that the commonwealth cannot be bound by any act unless specially named. On the principle for which I have already contended, if the act of 1792, on the subject of limitations had never passed, the act of 1748 would, when the revolution took place, have bound the commonwealth, though not specially named in it; because the revolution took away all the prerogatives of the king which grew out of his natural character, and the commonmonwealth in her public or political character could have no such privilege. The case of Bedinger vs. the Commonwealth (*a*), applies only to criminal cases; but it is certain that, although the commonwealth is not specially mentioned in the act concerning the Court of Appeals, yet this court has jurisdiction in other cases in which she is concerned. This then is an example of the commonwealth's being bound, although not specially named, and proves that, though not mentioned in the act of limitations, she may be bound by it. And, upon principle, why should she not; since no obstacle exists to prevent her claims from being prosecuted in due time?

(*a*) 3 Call, 461.

With respect to the question whether the act applies to motions, I will observe that the act of limitations is a *remedial* act, and great latitude in construing it has ever been allowed. The exceptions expressly contained in it have been extended by analogy to other cases coming within the same reason; and so therefore may all its provisions. It was in force before the motion-law; and when the forms of actions were changed by substituting motions, the principle of analogy ought to extend to the latter the same restrictions which before existed, as to the time within which the former ought to have been instituted. In this particular case, the legislature, by directing legal proceedings to be had against Kemp, did not prejudge the question, but left it to be decided by the courts, as

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cording to law. The application of the act of limitations to suits in equity is not altogether discretionary with the chancellor. In fact, it is a bar, even in cases where he may think it ought not to be; for he has no discretion. In cases of trusts, indeed, the act does not apply; but the present is not a case of a trust; because the money now demanded by the commonwealth was received by Kemp not as a trustee, but as his own; and as such he meant to keep it.

Cur. adv. vult.

Monday, November 3d. The court (consisting of Judges *Lyons*, *Carrington* and *Tucker*) unanimously affirmed the judgment of the District Court.

Tuesday, 4th November

The COMMONWEALTH *against* NEWTON, Ex'or of TUCKER.

An act of assembly authorising the auditor to issue warrants in favor of a creditor of the commonwealth on any particular fund will not stop the interest accruing on the debt, unless it appears that the fund was sufficient at the time for its payment

Where *specie* was lent to the colony of Virginia before the war, a certificate issued during the paper money times, for interest upon it, ought to

IN the years 1773 and 1774, Thomas Newton, as representative of Robert Tucker, deceased, lent to the treasurer of Virginia, pursuant to law, several sums of money, for which bonds were executed. On the 4th of September, 1778, Newton received a certificate for £280, being the amount of two years interest on the largest bond. Subjoined to a copy of that certificate is a memorandum of the auditor, in which he reduces it by the scale at four for one; and it appears that a warrant issued for interest to the first of January, 1788.

On the 28th of December, 1790, an act was passed intituled "an act granting a sum of money to William Shannon and others," authorising the auditor to issue warrants on the aggregate fund for the principal and interest due on the bonds. It did not appear that those warrants had ever been applied for by Newton. A portion of his claim having been rejected by the auditor, he appealed to the District Court of Richmond; where the points in controversy were, 1. whether he was entitled to interest on the bonds since the act of 1790; 2. whether the certificate aforesaid, reduced according to the scale, should be considered as a payment of its nominal amount. The first point was decided in favor of Newton, the second in favor of the Commonwealth; on behalf of which an appeal was taken to this court.

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The Attorney General, for the commonwealth, was about to argue the point, with respect to the propriety of applying the scale of depreciation to the certificate for interest issued in 1778; when the counsel for the appellee observed, that he did not mean to press that point, but should submit it to the court; without argument.

He then contended that interest, on the bonds, ought not to be allowed after the passage of the act of 1790, 1st. because the Auditor was directed to issue warrants to Newton chargeable on the aggregate fund, for the amount of the debt; 2d. because the presumption is, that the act passed at the instance of Newton; who, it is believed, was a member of the legislature at the time; 3d. because the auditor was always ready to issue the warrants, on application; and, 4th. because the legislature, at the same session, constituted an aggregate fund, out of which they were to be paid. This law directing the payment of the debt annulled the old bonds; and may be considered equal to a tender between individuals.

be reduced according to the scale of depreciation, and to be considered as a payment of its nominal amount.

Randolph, for the appellee. In times of great distress, Newton lent a considerable sum of money to the government of Virginia. The principal remained unpaid throughout the war; though the interest was received in paper money; and, in the loss sustained thereby, Newton only shared the fate of other citizens.

It was the duty of the auditor to issue his warrants annually for the interest; and nothing but an actual payment of the principal could prevent it. It is true that in 1790, an act passed directing the auditor to issue his warrants on the aggregate fund, for the amount of this debt; but the strongest presumptive evidence of the poverty of that fund, was, that Newton did not receive payment. Admitting him to have been a member of the legislature at that time, and that he applied for his money, was he bound to receive a paper drawn on a fund to be composed of arrearages of taxes, which might never come into the treasury? If he had not discovered, upon enquiry, that there was no money in that fund, he certainly would have received his warrants from the Auditor.

The passage of this law may be likened to an order drawn by an individual to discharge an old debt. Where a collateral fund is provided to discharge an existing debt, if the fund prove unproductive, the debt remains unsatisfied. Unless it is shewn that the commonwealth had money lying in the aggregate fund, to discharge this debt, the interest cannot be extinguished.

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Attorney General, in reply. There is no evidence that the aggregate fund was in the situation represented by Mr. Randolph. Ought not Newton, by some act, to have shewn that he disapproved of the law, or that he had applied at the treasury and could not receive his money? There is such violent presumption of his assent, that proof to the contrary must come from him, not from the commonwealth. There certainly is some weight in the objection, that the act of 1790, created a new debt; and that unless Newton could shew that he had applied at the treasury for payment under the law, without effect, the interest ought to cease.

Wednesday, November 5th. The President delivered the opinion of the court, (all the Judges being present) that the judgment of the District Court should be affirmed.

Wednesday, 5th Nov.

ROWTON *against* ROWTON.

Under the act of 1785, giving a widow dower in a trust estate, *it seems* that she is entitled to dower in an *equitable estate in fee-simple*, contracted, by verbal agreement, to be conveyed to her late husband, provided the contract be proved to be such as would authorise a court of equity to decree the legal estate.

The statute of frauds will avail the defendant,

WILLIAM ROWTON, Sen'r. having recovered, by an action of ejectment in Prince Edward District Court, a tract of land, of which his son Joseph Rowton was in possession at the time of his death, Mary Rowton the widow filed a bill of injunction in the High Court of Chancery stating, that a contract had been made between the said William and Joseph, that, if the latter would remove from New River, where he had resided, to the county of Charlotte and settle in his neighborhood, the former would give him a title in fee-simple to the said tract of land; that Joseph Rowton had accordingly removed at a great expense, and made valuable improvements on the land; that, in consideration thereof, he was entitled to a specific execution of the contract, and the complainant his widow to dower in the said land. The answer denied all the material allegations in the bill; insisting that Joseph Rowton, was entitled by the agreement to a life estate only, and that if he died without children, the land was to revert to William Rowton and his heirs; and also relying on the statute of frauds, as the contract had not been in writing.

A great variety of contradictory evidence was exhibited on both sides. The Chancellor finally decreed that the widow was entitled to dower, and perpetuated the in-

junction; from which decree an appeal was taken to this court.

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Wickham, for the appellant, stated, that the only question was, whether the wife could be endowed of an *equitable estate*, which belonged to her late husband; and it was a mere matter of evidence, in this case, whether the husband had such an estate, or not; for it was not even asserted that he had a *legal* estate. If the husband died since the act of 1785, as it was said he did, (viz. in 1793,) he was not prepared to say that the wife was not entitled to dower; provided it should appear that he had such an *equity in a fee-simple* estate as would authorise a Court of Chancery to decree the *legal* estate. But he could not admit that this was proved by the testimony in the cause.

altho' it be not formally pleaded.

Where the verbal evidence of an agreement is contradictory, the statute of frauds ought especially to apply against it.

Call, on the same side. The principal, and, perhaps, the only question in this cause is, whether there ever did exist such a contract as that stated in the bill. Some of the witnesses, indeed, attempt to prove that old Rowton, the father of the appellee's husband, did promise his son that if he would remove from New River, the place of his residence, and settle by him, he would, by his will, give him the land, of which dower is now claimed; and that, in consequence of this promise, the son did actually remove, and take possession of the land; on which he made considerable improvements. Opposed to this is the testimony of witnesses, much more numerous, and equally respectable, proving, that both the old man and his son, declared that, as the latter had no children, he was only to have an estate *for life* in the land, in case he survived his father. The uniform system of old Rowton appears to have been never to give an estate in fee-simple, to any of his children, lest they might die without issue, and the lands go out of his family. This is strong presumptive evidence that no such contract as that contended for by the appellee ever did exist. But if the court should be of opinion that there is any weight in the evidence adduced on the part of the appellee, yet the Chancellor certainly erred in making a final decree, in the first instance. Where there is such contradictory evidence, an issue ought to have been directed.

The directing an issue, for the purpose of ascertaining disputed facts, is discretionary with a court of equity, which may decide, on the evidence relative to such facts, without a jury.

Randolph, for the appellee. Whatever the evidence may be, in this case, ours is a most reasonable claim. Notwithstanding the appellant, in his answer, so roundly denies those parts of the allegations of the bill to which it is responsive, and introduces new matter by way of a-

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voidance, yet the answer is not evidence; because it is contradicted as to the first, and unsupported as to the latter by the whole current of testimony. It will be found from the evidence, either that Joseph Rowton the husband of the appellee had a right, which might be enforced, to a fee-simple estate from his father, or that there are peculiar equitable circumstances, in this case, which entitle the wife to dower. He then took a comprehensive view of the evidence; from which he concluded that a sufficient consideration was established to have entitled Joseph Rowton to a specific execution of the contract by a conveyance of the land in fee simple; and that his declarations concerning his want of title arose from an erroneous impression on his part, that because no writing had passed between his father and himself, he was without remedy. But declarations made under an ignorance of law or fact cannot prejudice the party making them.

Mr. *Wickham* had said that this cause depended upon a mere matter of fact. He was of the same opinion; and of course nothing was to be said about the statute of frauds. But if there should be, it might be answered that the statute was not pleaded, and that the contract was executed. Joseph Rowton having an equitable fee-simple estate vested in him, the wife was legally entitled to dower. But she had also strong equitable and moral claims. Having been induced by the promises of old Rowton to forsake a comfortable abode among her friends, and having contributed jointly with her husband to the improvement of the land, she had a right to expect a shelter from the inclemency of the weather. To deprive her of this right, and to give to the heirs of old Rowton the fruits of all the labor of his son expended on the land, would be to encourage the height of fraud and iniquity.

Wickham in reply. It is unnecessary to take up the time of this court in considering what will be the situation of the wife, if she should not recover her dower. The only question is, whether the husband had a fee-simple; for in no other estate can dower be had in this country. He would consider the case as if the husband was now before the court, applying for a specific performance of the agreement.

The contract attempted to be proved was a mere *nudum pactum*, and might be revoked at any time. It is denied that it ever did exist to the extent contended for by the appellee. The statute of frauds was as substantially pleaded, as is ever required in a court of equity; the defendant,

in his answer, after denying the allegations of the bill, insists, that the agreement, being a mere parol one, could not have been enforced so as to entitle the wife to dower.

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The improvements, which have been relied upon as forming a consideration for a specific execution, were no more than such as a tenant for life would be induced to make. There was no fraud in permitting the son to carry them on; because the old man always declared that he never would give him an absolute estate in the land, unless he had children. It is admitted that Joseph might have enforced a life estate, but nothing more. And all the testimony may be reconciled by considering the contract as a gift to Joseph for life, remainder to his children.

Cur. adv. vult.

Wednesday, November 12th, the Judges delivered their opinions.

Judge TUCKER. The appellee, the widow of Joseph Rowton filed her bill against the appellant, his father, for dower in 400 acres of land, to which she alledges the son had an equitable title in fee simple; the foundation of which will be stated hereafter. The defendant, the father, in the most express and positive terms denies all the allegations of the bill.

The original foundation of the widow's claim is thus stated by Thomas Harvey, one of the witnesses; that in the year 1787 or 1788, Joseph Rowton, the son, being on a visit at his father's in Charlotte county, (from New River, where he had lived for some time) came to the witness's house and asked him to ride over to his father's, which he did. When there, old Rowton said to the witness, "I want my son Joe to come and live by me; he is "a handy man, and I want him to live by me: I intend "to give the land over Cub Creek to my son William, "the place where I now live to my son John, and the "place where Frank Clark lived to my son Joe:" then added that William and Joe should pay the taxes on their parts, but he would pay them on John's. Joseph answered his father, "I don't like to improve the land, without "I have a right to it;" the old man answered; "My son, "I have willed it to you, and I will never take it away "from you, while I live, and what more do you want? "Well then, replied Joe, I will move down." That Joseph Rowton did move down to the land, made considerable improvements on it, and continued there till the day of his death. Joseph appears to have been at that time married to the complainant, his widow, by whom he ne-

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ver had any child. No other person is stated, or appears to have been present at this conversation The credit of Thomas Harvey is no where impeached, unless the total denial of all the facts charged in the bill, or of any promise made by the father to the son, to make him an estate of inheritance in the land, be considered as such.

Charles M'Kinney, another witness, among other things, deposes, that some time in 1793, he was requested by Joseph R. the son, to join him in building a mill on the land, to which he objected, unless his father would make him a deed for it. Joseph then requested the witness to ask his father if he was willing to make him a deed for the land, which he did; old Rowton answered, "that he had given "it to him, and willed it to him, and given him the patent "for it, and that his son had possessed it, and paid taxes "for it for several years, and he did not know what he "wanted, but, if he could not take his word, he would "give him a deed for it." Whether the mill was actually built by Joseph, or any thing done towards it, except some preparations for cutting stones for it, does not clearly appear, I think, from the record. To counteract this evidence there is an immense mass of testimony in the record, (some of which was objected to on the part of the widow, and in my apprehension very properly, particularly the affidavit of Wm. Rowton, jr. taken at his father's house before a magistrate, who would not permit him to be cross-examined, and several others appear to have been taken in the same manner,) to prove repeated declarations by old Rowton that he had never given his son the land, nor ever intended to give it to him but for his life, unless he had children; that he always paid the taxes; that he threatened some persons, whom he found cutting timber upon it with a suit; that Joseph Rowton on a variety of occasions, said he had no right to the land, and that he was afraid his father never would make him a right to it; that, on more than one occasion, he endeavored, through the medium of friends, to prevail on his father to make him a deed, who constantly refused, alledging he never intended to give any of his sons more than a life estate in their lands, unless they should have children, that the lands might not go out of his own family. But none of the testimony goes to contradict the declarations made to Thomas Harvey and Charles M'Kinney. Joseph Rowton's acknowledgments, as above stated, appear always to have been made as a ground of complaint and dissatisfac-

tion at his father's conduct, but never to him, or in his presence.

Having thus stated what I consider to be the substance of the whole evidence on both sides, as far as it appears to me to be material, I shall proceed to consider it.

The testimony of Thomas Harvey, is a direct, substantial, and positive affirmation of a particular fact, not contradicted by any other testimony, nor even denied by the answer, except by implication and evasion; and to my apprehension amounts to full proof of a contract between the father and the son, in the terms detailed in his deposition. I consider it as an undeniable position, both at law and in equity, that one witness, whose credibility is not impeached, who deposes clearly and positively, in affirmation of any fact to which that witness was privy, is entitled to belief more than a dozen witnesses, who merely depose to their own ignorance of that particular fact, though by possibility they might have been in such a situation as to have seen or heard the same, if their attention had been called to the acts or words of the parties at the time. As, if a question were made, upon the plea of *nil debet*, at law, whether the supposed endorser of a bill of exchange actually did write his name on the back of it, if one witness, present in a coffee house or exchange, should swear that he saw the party write his name upon the bill, such evidence if the credit of the witness be unimpeached, ought to weigh more than the testimony of a dozen persons, present in the same coffee house at the same time, who should swear that they did *not see him* write his name on the bill, though all of them were in such situations as that, by possibility, they might have seen him do so, or might have remembered that he did so, had their attention been equally drawn that way, as that of the witness affirming the fact. And such testimony ought moreover to countervail that of fifty witnesses declaring they had heard the supposed indorser declare that he never had endorsed a bill of exchange in his life, nor ever would as long as he should live. Now the indorsement, in the one case, and the contract between the father and son, in the present case, being the very *gist* and foundation of the suit in each case, if the proof of the execution, in either rest upon such positive, direct, and affirmative testimony, ought that evidence to be shaken by the declarations of witnesses not present at is completion? If not, the proof of the original contract between the father and the son in the presence of Tho. Harvey; and of the confirmation thereof, afterwards, in the presence of, or, rather, addressed to Charles Mc-

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Kinney, as the agent or friend of the son, remains unimpeached by all the testimony produced on the part of the father. For although the son's declarations, that he had no right to his land, and that he feared his father never would make him a right to it, may seem to countenance an acknowledgement, on his part that he had in fact no CLAIM upon his father for the land, but enjoyed it merely through the old man's curtesy, as he expresses it in his answer, yet this never was the language of renunciation, or of release to *his father* but merely of complaint to his family, friends and neighbours. The word *right* is generally used in a popular sense in this country, as synonymous with a deed, and in that sense, was probably used by the son, when complaining of his father's conduct. Or if it were not, he possibly was not sufficiently versed in the maxims of law or equity to know, that, by performing a thing at his father's request, whereby he had incurred considerable charge and expence, he had acquired a *right* to compel his father to perform his promise. What then was old Rowton's promise? If you will move down and settle upon the land, it shall be *yours*. "I have already willed it to you, and I will never take it from you while I live. "Then, said the son, I will move down:" and he did so; this was a promise founded on a consideration chargeable to him to whom the promise was made; and though no benefit should accrue to the father, the circumstance of its being attended on the part of the son, with a charge and expense made it binding on the father. The interpretation, as understood by the son, was, that he was to have an absolute estate in the land; for he expressly refused to move down *and improve the land* unless his father would give him a *right* to it. "My son, said the father, I have willed it to you, and will never take it from you while I live." The word *willed* it is true, is not a technical word, but connected with the preceeding conversation and condition, insisted upon by the son, it ought to be understood in the most liberal and beneficial sense *for the son*: for they are the words of the father: *et verba fortius accipiuntur contra proferentem*. Old Rowton evidently meant, in his answer, to avail himself of the *equivocal* sense in which the word WILLED might have been used by him: but that ought not to serve his purpose. He betrayed his son into expense, in removing and improving the place: an expense probably little suited to his circumstances, and which he never would have incurred but for his father's proposal and promise. And this, in my opinion, takes the case completely out of the opera-

tion of the statute of frauds, which certainly was not meant or intended to countenance, or encourage fraud in one from whom the contract first moved. Having fully complied with all the old man proposed, incurred expense and improved the place, I hold him well entitled to a performance of his father's promise, in a manner most beneficial for himself and family, and, therefore, am of opinion that the decree be affirmed.

Judge ROANE. In no case which ever occurred before me was the policy and utility of the statute of frauds made more manifest, than in the present. The great mass of conflicting testimony existing in it, makes it probable that those perjuries and evils may have been produced, which it was the peculiar object of the statute to prevent. We are told (Powel on contracts 266) that the English statute, (which is substantially like our's) was made to avoid perjuries, and prevent persons from swearing *verbal* agreements upon others, & thereby charging them in equity to perform them.

The act of frauds is relied on in the present case; and the agreement, as charged of a promise to convey an estate of inheritance to the son, is not *confessed*, but on the contrary is expressly denied in the answer. There is no pretext, therefore, on the ground of confession for a court of equity to dispense with the forms required by the statute. It is not even confessed *in the answer*, that a promise was made to the son of an estate *for his life*; the father, on the contrary, expressly says therein, that he permitted his son to live upon the land, *on curtesy merely*. It is true that the son entered upon the land and improved it, and this, it is said, is an execution of the contract, and supersedes the necessity of proving a *written* agreement. This is admitted; but yet an *agreement* must be proved commensurate with the interest on which the appellee founds her claim of dower. I take the rule to be, that in case of part performance of a contract, the plaintiff, after shewing such performance as here, by building, &c, may then go on to *prove* the agreement, by the *confession* of the defendant, or by evidence *aliunde* but certainly a proof of performance while it dispenses with the necessity of a *writing*, does not supply all *evidence whatever* of the agreement, 1. Fonb. 172. In the case before us, therefore the execution of a contract shall be *referred* to the agreement as *confessed*; viz. of an estate upon curtesy, unless an agreement to give a larger interest is proved against the father.

But admitting that the improvements made in the pre-

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sent instance are not *referable* merely to the title of curtsey admitted in the answer;—to a claim resting only on parental justice and affection; may they not be referred to, and stand justified by, a promise of *an estate for life* to the son, with remainder in fee if he had issue; which, although not ADMITTED in the answer, is the *most* that can be said to be proved against the father by the testimony? Was not the promise of such an interest enough to justify the improvements made by the son? And if we go beyond this line; if we refer the expense and improvements in question, to the promise of an estate in fee, must we not prove the existence of such promise? Shall the proof of improvements which will consist with, and are justified by the promise as admitted or proved, be not satisfied thereby; but carry us without proof, to an extension of the promise to the farthest possible limits:—to dispense not only with the forms required by the statute of frauds, but to the adoption of an inference, bottomed on no proof at all, and the most strong which could possibly be made against that person for whose benefit the act of frauds was provided? Is there, in short, any reason for setting up a construction of the statute, in dispensing with *written* evidence, which will justify a deduction of an agreement from no adequate testimony whatever? Every thing that I now say in relation to a case of total deficiency of testimony equally applies to cases in which the testimony *aliunde* is outweighed by the testimony of the answer, and therefore is no evidence whereon to ground any decree whatever.

The wife in the present case stands on no better ground than the son would do, if he were suing for a specific performance. She was married *before* the promise spoken of by *T. Harvey*, and therefore was not influenced by it: the conversation stated by McKinney to have taken place in 1779, was not addressed *to* the son, nor is there any certain proof that it ever came to his knowledge.

The charge in the bill is, that the son was *entitled to the land in question by promise from the father, who assured him that a conveyance should at any time be made him.* The very words in which the promise was made (if indeed any *promise* is expressly alledged) are not set out. The charge is of an *estate of inheritance*, for a lesser interest would not suffice for the wife: but that charge is made by way of *inference* and not *totidem verbis* with any promise: the defendant is called on to answer *the premises.* In his answer he denies having ever promised any *estate of inheritance or any such estate as in the said bill is pretended*, and he

even negatives a promise of a *life interest*, by saying that his son lived on the land by curtesey merely. Is it not enough that he has answered the bill in the manner propounded by the bill itself ? is it necessary that he should have entered into a special negation of the particulars of a promise, when none such is set out in the bill ? Has he not denied the allegation actually made (at most) in the bill, of a promise of an estate of inheritance ; and even gone beyond it, by denying even the promise of an estate for life ? Shall a plaintiff who calls a defendant into a court of equity, be permitted to deny the sufficiency of an answer made by a mere negation of the fact charged, and with, at least, as much particularity as the charge itself is made ?

The testimony of *T. Harvey*, I admit is extremely strong, bnt it is outweighed by the *testimony* of the answer : that testimony will not prevail against the answer, unless it is corroborated by other evidence ; and if the answer is equally corroborated, it will still preponderate. The testimony of T. H. therefore, taken singly is wholly insufficient to establish the agreement in question.

I will take a short view of the testimony supporting that deposition, and of that supporting the answer. McKinney says that in 1779 or 1780 he heard old Rowton declare his intentions relative to his son *Joseph*, but these were merely his intentions, not declared to *Joseph* and formed no contract. He says that in 1791, old R. said he had willed the land to Joe, (but it does not appear what estate therein was willed,) and had given him the patent therefor. Abundant other testimony in this cause shews that the patent was merely delivered to enable the son to ascertain the lines of the tract. He says, (in addition,) that in 1791, old R. speaking respecting a mill seat, *said* he would make his son a deed for the land : but C. another witness on the contrary, says that Joseph R. told him his father had refused to make him a right even for the mill seat. H. Hines also proves a refusal on the part of old R. and these, with other circumstances as to this subject, outweigh McK's testimony respecting the willingness of old R. to make a deed. *Pucket's* testimony seems *somewhat* in favour of the appellee, but it is discredited by Molly R's relation of a different account having been given by him at the time, of the conversation between old R. and himself. W. Harvey proves merely general declarations by old R. of his intentions, but not made to Joseph. As to the testimony of old R's declarations at the funeral, I lay no stress whatever upon them. His situation and feelings at the time produced those de-

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clarations, which I regret exceedingly he has not substantiated: but we are to be governed by the law of the case.

Such is the testimony coming in aid of T. Harvey's deposition. I doubt whether (checked as I have already stated it to be) it would outweigh the single answer of the father: but that answer is, on the contrary powerfully supported.

W. Rowton jr. (disinterested at the time) says that *after* his brother Joseph settled on the land, he heard him say "that his father never promised him the land longer than for his life, and then to return to the rest of the children." Suppose Joseph were now suing for a title, would not this admission completely estop him. H. H. and J. B. prove Joseph's declarations (less strong) but to the same effect. S. B. heard Joseph say a few days before his death, "that his father still refused *to give him* the land. W. B. heard Jos. say, *after he lived on the land*, that he had *no right* to his land, except he had children. Many witnesses prove old Rowton's declarations to the same effect. M. P. B. to the same effect. B. W. and N. B. both say they have often heard Joseph say, since he lived upon the land, that his father NEVER WOULD AGREE to give him the land longer than for life; and the latter witness proves that the appellee admitted that her husband *knew this* before he moved down. J. W. has heard Joseph say, *he had no right to the land*, and did not know whether his father ever would give him one. I will readily admit, that this term "right," standing singly, might be taken as meaning a deed; but in this case where there is so much testimony shewing even Joseph's own admission that *no agreement* had ever been made to convey the land, I cannot understand it in that limited sense.

Several affidavits taken in this cause, and read in the court of chancery, are objected to on the ground that McKinney was prevented from asking questions. The answer is, that if it is now (in this court) regular to make the objection, yet McKinney is not shewn to have been an agent; and, if not, he had certainly no right to *obtrude* himself into the cause: he was often asked by the magistrate to shew his authority for intermeddling in the cause, but shewed none. Unless therefore we are prepared to say that a magistrate is bound to permit any person whatever to examine witnesses convened before him by the parties to a suit, we must admit that his refusal in this instance was correct. But whether he *were shewn to be an agent* or not, his ma-

nifest solicitude on this subject, would, at least, *weaken* his testimony considered to be so important by the appellee.

I have thus glanced at the testimony in this cause. In general, I do not think it necessary to particularise and comment upon the testimony; but in cases depending upon it, I think it enough to declare the result of my reflection thereupon. In this case, however, it seems necessary as a difference of opinion exists as to the weight of evidence.

With deference to the opinions of other gentlemen, I must contend, that the evidence of the answer, and other testimony agreeing therewith, greatly preponderate in this case, and that there is no *agreement proved* in this cause, which will authorise us to sustain the pretensions of the appellee, and that therefore the decree should be reversed.

Judge FLEMING....The only material question in this cause seems to be whether the appellee has shewn a title in equity, to dower in the lands in question, of which her late husband died possessed? And, there being a great contrariety of testimony in the case, it required more than ordinary attention to scan it, in order to discern on which side the evidence preponderates. The two most material witnesses in favor of the claim, are Thomas Harvey and Charles Mc.Kinny: and, though I cannot suppose either of them guilty of perjury, yet there are circumstances disclosed in the course of the testimony, sufficient to convince me, that each of them had a strong bias on his mind, in favor of the appellee; and, first, with respect to Harvey.—It appears that the timber which J. Puckett in his deposition mentions himself to have been employed in cutting, when challenged for so doing by old Rowton, was for Harvey's saw-mill; who, no doubt, as the timber was cut by leave of Joseph Rowton, wished the title in the land to be established in him; especially as old Rowton threatened him with a suit for procuring that very timber to be cut: and I have not a doubt but Puckett, who was employed by Harvey to get the timber, has sworn falsely; for he says in his deposition, that, as soon as he told old Rowton he was getting the timber by Joseph's permission, the old man replied "very well, for it is Joseph's land, and he had a right to do as he pleased with his own"; which was very different from the general tenor of the old man's conduct and conversation respecting the land, and is not to be believed: especially as he (Puckett) told one of the witnesses (when he went to grind his axes, soon after the transaction) that "when he

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"was cutting timber off the land for Thomas Harvey's saw-"mill, old Rowton was very angry,—asked what right his "son had to give Tom Harvey leave? said that his son Jo-"seph had not a foot of land that he knew of; and ordered "Puckett to clear himself off the land, and cut no more tim-"ber on it,—damned him, and Tom Harvey too, and said "he would sue them both." This, I believe, was a true account of the matter, as it was told immediately after it happened, and seems perfectly consistent with the temper and general conduct of old Rowton.—With respect to Mc.-Kinny, it appears from his own deposition, as well as from other testimony in the cause, that he was anxious to join Jos. Rowton in building a mill on the land, which the latter would not undertake, unless he had an absolute title to it. It also appears by the record, that Mc.Kinny, although a witness himself, and not an agent of the Appellee, was busy interrogating other witnesses on their examination, until restrained by the magistrate before whom their depositions were taken; and, to shew his enmity to, and prejudice against Wm. Rowton senior, he told one of the witnesses, that if he was in Joseph Rowton's place, he would hire negroes, cut down the land and wear it out.

These circumstances induce me to attend to the testimony of Mc.Kinny and Harvey with caution and distrust. Thomas Harvey says that in 1787 or 1788, he was at old Rowton's, with his son Joe, who then lived on New River, when the father said to the deponent, "I want my son Joe "to come down and live by me; he is a handy man.—I in-"tend to give the land where Frank Clarke lived, (being "the land in question,) to my son Joe;" Joseph answered "his father, "I don't like to improve land without I have "a right to it." The old man answered, "My son I have "willed it to you, and I'll never take it away from you while "I live, and what more do you want?" "Well then," re-"plied Joseph, "I will come down." He did move down to the same land, made considerable improvements on it, and continued there until his death. Admitting the above relation of a conversation between William Rowton and his son Joseph, to be literally true, it does not in my conception amount to a contract to convey to the latter a fee simple in the land in question. It was a promise (on good consideration I admit) that Joseph should enjoy the land, at least during the life of the father, and every one knows that a will may be revoked at any time during the life of the testator.—Charles Mc.Kinny says that in 1779 or 1780, Wm. Rowton sen., speaking of dividing his lands among his sons,

said he had given to Joseph 400 acres on Rattle Snake Creek; that Joe had hired John Smith, his brother in law, to clear a piece of ground, and build a cabin on his part of the land, which he intended for a shop; (there was a beginning of an improvement about that time, but it was dropped, in consequence of Joseph's going a tour in the army;) that in 1787 one Jas. Rather settled on the land by permission of Wm. Rowton, sen. and it being reported that Rather had a lease for seven years, the old man said it was false;—that he permitted him to remain there only until his son Joseph should see cause to come himself, let the time be long or short, and, that in the month of April 1789, Joseph came from New River and took possession. What Mc.Kinny and other witnesses have said respecting the taxes, finding the lines, and Wm. Rowton Jr's. having, in 1788, rented the land to Francis Clarke, in behalf of his brother Joseph, is perfectly consistent with the latter's having only an estate for life in it; and the circumstance of the patent's having been sent to him, is fully explained by several of the witnesses, as being for the purpose of finding the lines between Rowton and Stith. Mc.Kinny further deposeth that, when he was about joining Joseph Rowton, in building a mill on the land, he requested the deponent to ask his father if he was willing to make him a deed for it? which he did, and old Rowton answered, "that he had given it to him, and "willed it to him, and given him the patent of it, and that "the said Joseph had possessed it, and paid taxes on it for "several years, and he did not know what more he wanted; "but if he would not take his word, he would give him a "deed for it." But the witness does not say what kind of deed—whether to convey a fee, an estate for life, or a lesser estate; besides, the declaration, (if made at all, which I very much doubt,) was without consideration, and made to a third person, in the absence of Joseph; who, it seems, paid no regard to it, since it doth not appear that he ever applied for the deed, or began to erect a mill on the premises; and Peter Stern, who was in the habit of cutting and furnishing mill stones, deposeth that, Joseph Rowton, in a conversation with him on the subject, informed him that he had asked his father for two or three acres to set a mill on, but he refused, and told him, that he had not made him a right, and never would. The depositions of three Harveys and of W. Hannah, &c. were all taken on the same side of the cause, but are too unimportant to require further notice. Opposed to this testimony in favor of the appellee is, 1st. the answer of Wm. Rowton, the appellant, who ex-

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pressly swears, that, though he permitted his son Joseph to live on the land, he never did promise, but always refused to make him a title, because he neither had, nor was likely to have a child; and he was determined that the inheritance should not go out of the family; and that he sent the patent to Joseph to enable him to find the line between him and Thomas Stith. This answer (according to well settled rules of evidence) is paramount to and refutes the testimony of Tho's. Harvey; even if he had sworn, that William Rowton, sen. had promised his son Joseph to convey the land to him, in fee by an absolute deed. The answer is, however, strongly corroborated by the testimony of a number of witnesses, who depose to the frequent and uniform declarations of the appellant (for a number of years) to the same effect; and for the same reason, that he was determined, that the inheritance of the land should not go out of the family. And, (what is still stronger and more convincing,) several of the witnesses depose to the repeated confessions of Joseph Rowton himself, that his father never would promise, or agree, to make him an absolute title to the land in question, of which he was often heard to complain. From this view of the evidence, it appears to me that the weight of it is in favor of the appellant. And this is a very striking case, among many others, which to my mind evince the wisdom, propriety and good policy of the statute of frauds and perjuries, which, in my conception, ought not to be disregarded and overleaped by courts of equity upon such slight and trivial grounds. I am of opinion, upon the whole, that the decree is erroneous; that the injunction ought to be dissolved, and the appellant to have the benefit of his judgment at law.

Judge CARRINGTON.....It is admitted that the answer promptly denies the allegations of the bill; in which case it is an established rule in equity, that to disprove the truth of an answer two witnesses are necessary, or one witness, aided by corroborating circumstances.

In the present case there are two prompt witnesses supporting the bill and contradicting the answer. The first of these is Thomas Harvey, who proves that in a conversation moved by the father to the witness, the father expressed a desire that his son, the then husband of the appellee, would remove from a distant country and live near him, and said that he intended to give the son the lands in question; that the son, being present, observed that he did not care to improve land without a right to it; to which the father answer-

ed, that he had *willed* the land to the son, and he never would take it from him; that thereupon the son accepted the offer, and did actually remove himself and family to the land, was put into possession by the father, made improvements, and occupied it till the day of his death: and thus I think an equitable title to hold the land in fee simple was vested in the son.

In aid of this testimony is that of Charles Mc.Kinney, (whose credibility is no where doubted, but by the counsel for the appellant) who proves that the father, on being pressed to do his son justice, answered, "I have given my son "the land,—have willed it to him; he is in possession; he "has paid the taxes; I do not know what more he wants; "but, if he cannot take my word, I will make him a deed." Upon such a contract and performance of the consideration, I have supposed that, upon application to a court of equity, a specific performance on the side of the father would most certainly have been decreed.

What are the circumstances in aid of the testimony of those two witnesses, if indeed any were necessary? They are that a man by the name of Clarke rented the land as of Joseph Rowton; that the son abandoned a satisfactory settlement afar off at the particular instance of the father, incurred the fatigue and expense of moving himself and family to those lands, paid the taxes and made considerable improvements; that the father had at different times declared the lands to be the lands of his son, and that the son had for many years occupied them as his own. All these circumstances, combined with the testimony of the two witnesses, prove to me the engagement of the father and the consequent expectations of the son.

I presume it will not be denied that, when a contract occurs between two people, neither can, by subsequent declarations of his own, annul that contract without the assent of the other. It must also be ad-mitted, that he who performs the contract on his part may in equity compel the other to perform on his part.

A number of witnesses prove *declarations of the father* that he never meant to convey more than an estate for life, unless the son should have a child or children. But did this release himself from a solemn compact without reserve? He had promised a *right* to the land by will or deed; and the general understanding of people of his class is that a right to lands is an absolute title, and all his own subsequent declarations had no effect to destroy the original contract moved by himself.

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It is true that a number of witnesses prove loose conversations with Joseph Rowton on this subject, and much industry has been used to turn them to his disadvantage. He was heard to say that his father would never, he feared, make him a title. Some have sworn that he said his father never promised a title unless he should have children. But what is the fact? The two witnesses prove the contrary. And Joseph Rowton always, when speaking on the subject, spoke in a style of complaint, and considered it as a grievance that his father would not comply with his contract, and do him justice. But, because he did not *sue his father*, his forbearance is to be construed into a release of the contract! He might have had a tenderness for his father, or he might have mistaken his rights. If after conversations with unauthorised persons are to have any weight, let those of the father expressed differently at different times be set against those of the son, which will leave the matter as it stood upon the original contract.

It is observable, however, that at least nine of the witnesses, who press most hard upon the title or equitable claim of the son, were examined and mere affidavits taken, (for any thing that appears,) without authority, without notice, and, for aught appears, in the absence of the appellee, whose friend was not permitted to interrogate a single witness. For these causes an exception was taken to those affidavits, which exception was undoubtedly well-founded. The Chancellor, it is presumed, paid no respect to those affidavits, nor do I; especially when it appears that the greater part of those witnesses were the family of Rowton, who expected a benefit from the sale of those lands and a distribution of their value. Those witnesses, if their depositions had been regularly taken, are admitted to be competent; but I own they have not that weight with me which they would have had if entirely disinterested.

The statute of frauds has been mentioned as a bar to the claim of the appellee. My construction of that statute is that it was enacted to *prevent*, and not to *protect* fraud, by sheltering a man against the performance of a voluntary contract where he had received a valuable consideration.

As a proof of the appellant's own opinion of this contract, my attention has been drawn to a very late declaration of his. When in his serious moments attending the funeral of a murdered son, he said to the son-in-law of the appellee, "go, and take care of your mother-in-law; there is a "good plantation and house, it will be your own at her "death." Although the old man was mistaken as to the

legal course the estate might take, it shewed that he then had no pretence to the lands.

I consider this whole transaction as a premeditated fraud on an unfortunate woman. She was induced to leave her parents and connexions in a distant country to come hither with her husband, upon a fair prospect, that, in case of his death, she would have at least an establishment for life. But how was she disappointed! The violent hand of the murderer deprived her of her husband, the ruffian hand of a cruel father-in-law ousted her from the lands of that husband; and thus she is abandoned to want and distress amongst inhospitable strangers. A greater fraud is seldom perpetrated.

Upon the whole of the circumstances of this case, I am clearly of opinion that the appellee is entitled to dower in the lands in question, and that the decree ought to be affirmed.

Judge LYONS. This suit must have been brought on an after-thought of the widow plaintiff or her friends, by the advice of others who prompted and encouraged her to teaze and vex old Rowton for turning her out of possession, and, perhaps, from private pique or animosity, because she well knew she had no good grounds for the suit, as her husband often told her that he had but a life estate in the land.

I have always understood that agreements of every kind were to be executed according to the true intent and meaning of the parties thereto, as expressed and fully understood by themselves, and not as understood by others no way concerned or interested in the business; for the parties best know their own agreements.

The father, in this case, swears in his answer that he never gave, promised, or intended to give his son an estate in fee, or more than an estate for life in the land, unless he had issue; and the son, at all times after the bargain, during his life, acknowledged and declared that his father never did promise or agree to give him more than an estate for life in it, and that he never expected more, unless he had issue.

Yet the chancellor has decreed a fee-simple, and has given dower to the widow, who never expected it, as was plainly evinced by her injuring the land and houses greatly, according to the testimony, at the time of her removal from the plantation, carrying away locks, plank, &c.

The evidence in this cause has been compared to that in a case propounded relative to a bill of exchange; where one person only should prove that A. endorsed it, although

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twenty others in the room where the endorsement was written did not see or observe it, and it was said that, in such a case, A. would be made liable as endorser. But if B. the endorsee and holder of the bill had always, and long after, declared that A. did not write his name, nor ever endorsed it to him, but constantly refused to do so, and the executors of B. should sue A. as endorser, would any court or jury oblige B. to pay the debt? Now the holder of the land in this case having always declared, after the pretended promise in the bill, that he had only an estate for life in the land, and that his father had never agreed to give him a greater estate, is his widow or heir to have more than he claimed himself? The answer to that question is so plain and evident, and the case so clear, that I should have no doubt about it, exclusive of the statute of frauds, but should dismiss the claim as groundless and fraudulent.

The affidavits, altho' excepted to at the rules, were not objected to at the hearing, but allowed to be read; whereby the former exception was waved, and cannot now be repeated in this court; and, as the cause was not heard on a mere motion to dissolve the injunction, but set down for a full and regular hearing in due course of law, it is not to be retained or remanded for any farther proceedings; which, indeed, the counsel did not desire. The decree therefore must be reversed, the injunction dissolved, and the bill dismissed with costs.

LONG *against* COLSTON.

After an action at common law has been brought to recover damages for breach of a contract, the deft. has no right to file a bill in equity to compel the plaintiff to accept of a specific performance: unless some parti-

ON an appeal from a decree of the High Court of Chancery. The case was this. Long had contracted to convey to Colston, by special warranty, all his interest, derived from his wife, in an estate in England. Both parties supposed it would far exceed £6000 sterling. Colston was to take the entire value of the estate in England, at one pound currency for one pound sterling, and to pay Long, in hand $5000, and convey to him western lands to the amount of $15000, at two dollars per acre; and whatever the English estate, when finally ascertained, might exceed the sum of $ 20,000, Colston was to pay Long at the above rate. A suit having been for many years depending in England, concerning this estate, Colston was to receive a power of attorney from Long and wife, to attend to its

conclusion. It was further contracted, that in the event of a revolution in England, (which was then apprehended,) by which an obstacle to the recovery of the estate might be produced, no reimbursement was to be made by Long, nor was Colston to be bound by his bond, which he had given in pursuance of the contract, to secure the payment of the excess over the £ 20,000: but nothing was said about any reimbursement by Long in case the estate fell short of that sum. Long and wife conveyed their right to Colston, but without any privy examination of the wife, as it was said; and Colston paid the £ 5000: but understanding that the English estate, (though not finally ascertained) did not amount to more than 3 or 4000 pounds, chiefly in three per cent. stock, he refused to convey the lands to Long, unless he would give him security to refund, whatever that estate might fall short of the payments actually made. Upon this refusal, Long brought an action of covenant on the articles of agreement, in the district court of Winchester; and while the suit was depending, Colston filed a bill in the High Court of Chancery to injoin the proceedings at law, and to transfer the case from the former court to the latter; which was directed accordingly by the Chancellor.

The controversy principally turned on the following points. 1. Whether after a breach of the contract by one party, as was alledged, and the other had elected to proceed at law for damages, a court of equity could properly interfere on the grounds stated in the bill. 2. Whether under a fair exposition of the articles and a bond taken in pursuance thereof, Long was entitled to the £ 20,000 at all events, or only a rateable proportion according to the value of the English estate.

The Chancellor, being of opinion that a court of equity had jurisdiction, and that Long was only entitled to be paid *pro rata*, according to the value of the English estate, perpetuated the injunction, "on the complainant's conveying "to the defendant such of the lands described in the con- "tract between them, as are equal in value to the differ- "ence between the sum of £ 5000, (which the complainant "had paid,) and the defendant's proportion in his wife's "right of the Chichester estate in England."

Williams, for the appellant. There are two questions in this cause. 1st. Whether the case was not completely cognizable at law; and, if so, ought a court of equity to have interfered? and 2ndly, if it ought, whether the decree is not erroneous.

cular grounds of equity exist on his behalf, excusing and relieving against such breach, and shewing that the contract ought, nevertheless, to be specifically enforced.

If C. agrees to pay L. a sum of money or to convey to him certain lands upon L's making him a deed for all his right to an estate, the *value whereof is uncertained*, but supposed to exceed the value of the consideration contracted to be given by C; & *L. makes the deed*; it *seems* that C. has not a right, on the ground of a supposed deficiency in the value of the estate, to withhold performance on his part, until L. shall

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It will certainly not be denied, that either party, on the refusal of the other, might bring a bill for a specific performance; or, elect to proceed at law for damages. But after one party has resorted to his legal remedy, the other cannot be permitted to go into a court of equity.

If it should be said that *Colston* did not refuse, then he must have succeeded at law, and this being a question equally triable there, the injunction ought not to have been awarded. But, if he did refuse, then *Long* had a legal advantage given him by the conduct of *Colston*, and a court of equity ought not to have taken it from him. *Long* had executed his part of the contract: if *Colston* had offered to do the same, he must have prevailed.

But it may be said, a jury might have assessed imaginary damages; and their verdict must have been for *money* altho' *land* was to have been conveyed. To this it may be answered, that the rules of property, rules of evidence, and rules of interpretation of contracts, in both courts, (except in the case of a discovery from the defendant,) are the same (*a*) If the jury had adopted an improper rule of construction, a court of law was competent to correct it, by setting aside the verdict.

It may also be urged, that application was made to a court of equity to do that, which the parties had stipulated for. Had *Colston* performed his part of the contract when he ought to have done so, *Long* would have been satisfied; but having refused, *Long* had his election, and might with great reason, proceed at law for damages, because he had to pay *money* on another contract, instead of *lands*, in consequence of the refusal of *Colston*.

But it will be argued that *Colston* was willing to perform, agreeably to *his idea* of the contract. If this had been a fact, and his exposition a correct *one*, *then* proof of such offer, and of a refusal by *Long*, would have entitled *Colston* to a verdict; for there would have been no breach. The evidence, however, is, that *Colston* refused to perform, unless *Long* would submit to new conditions not warranted by the contract.

Having considered the question of jurisdiction as the case appeared on the words of the contract, the next enquiry would be whether there is any thing *dehors* the contract to create an equity.

The bill being for a specific *performance* of the contract and not to rescind it, *Colston* must be considered as applying to enforce it on his own part, *Long* having already done all that he was bound to do on his part. The contract be-

give him an assurance to make good such deficiency; but is bound to immediate performance; &, when the value of the estate is finally ascertained, may have such remedy for the deficiency as shall be equitable.

(*a*) 8 Black com. 434. 2. Burr. 1108.

ing thus sanctioned, the only enquiry is, ought the court to decree it, or leave the party to his remedy at law?

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It is said, indeed, that Long deceived Colston with respect to the value of the English estate; but of this there is no proof. They were both probably under an erroneous impression as to its amount, and Colston had the best means of information. If he was deceived, it was by his partner Gen. Lee; who professed to have an accurate knowledge of the subject. Or, if the latter should be considered only the agent of Colston, still the effect would be the same. Notice to an agent is sufficient, even to make a party a purchaser with notice. Lee was apprised of the intention of Long, to have the $20,000 in every event. It appears then to have been a fair transaction on the part of Long; but if it had been fraudulent, it might have been a ground for setting aside the contract, not for decreeing a specific performance.

On the second question, he contended that the decree was erroneous, even if the court of chancery could properly interfere.

1. From the fair exposition of the contract itself, Long was to have the $20,000 at all events. The preceding part of the sentence which prescribes that Long should not be responsible in the event of a revolution in England, is complete in itself. It then goes on to stipulate, that, as to the sum paid, no re-imbursement should take place. The bond which was executed on the same day, in pursuance of the agreement, proves the ideas of the parties to have been as here stated. So does the deposition of Mr. Lewis, who reduced the contract to writing. If it is objected, that his is parol evidence; it may be answered, that such evidence is admissible to explain the intention of the parties to a deed or agreement where it is ambiguous or doubtful. In the case of Ross vs. Norvell (*a*) parol evidence was admitted to prove an apparently absolute bill of sale a mortgage; and it is there laid down that the admission of it must depend upon circumstances.

(*a*) 1 Wash 14.

2. The decree is also erroneous in compelling Long to take lands to which Colston had no title.

3. In not directing an account, and making a final end of the cause.

4. In not decreeing the lands elected by Long to be taken agreeably to the contract.

Call, for the appellee, contended, 1. that Colston was not bound to pay the sum of $20,000, at all events, but

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only a rateable proportion. Wherever there is a deficiency in the article sold, unknown to the buyer at the time of the contract, a court of equity will give relief, unless there is an express stipulation to the contrary: for an implied stipulation will not do. (a) He also cited the case of Bedford vs. Hickman, M. S. Nov. 1804, in which there was no proof of fraud on the part of the vendor, but the court gave relief to the vendee on the general principle. In Pendleton vs. Stuart (also M. S.) there was an express stipulation to take at more or less; but in the agreement between Long and Colston there is not a syllable of this nature. Colston knew nothing about the value of the estate. The presumption is, therefore, against his having intended such an agreement. A bargain of chance is generally a matter of speculation; but, here, Colston could not calculate on gain, but might lose; since, if the value of the estate exceeded $20,000, Long was to have the surplus. The property had been in suit ever since the year 1742, and might continue many years more. The small profit arising from the difference of exchange was a mere mockery, and besides very uncertain, the rate of exchange being subject to fluctuations. The terms of the written agreement also confirm this construction. The clause concerning political convulsions or revolutions proves plainly, that Colston was to bear a loss occasioned by such events only; according to the maxim that *expressio unius est exclusio alterius*. Mr. Williams by a violent criticism separates the member of the sentence, by construing it so that no reimbursement was to take place in any case; whereas its evident meaning is that no reimbursement was to take place in that one case. The articles and bond are to be taken together, and as explanatory of each other; the fair meaning of both being that for the entire value of the Chichester estate £1 currency was to be paid for £1 sterling.

(a) Pow. on Con 196, 197 1 Gall, 316, Jolliffe vs. Hite.

(b) 3 Call, 194.

(c) 1 Vez. sr. 234 1 Bro. ch'y cases, 472.

(d) 8 Co 155, 3 Wils. 275. 2 Bl. Rep. 1250. Bunb. 65—4 Bro. 515.

2. Parol evidence cannot be admitted in this case to explain the writing. In Gatewood vs. Burrus (b), the distinction is stated between latent and patent ambiguities. A separate, independent, collateral fact may be proved by parol evidence to explain a latent ambiguity, relative to the person or thing, or a resulting trust (c). In the case of a resulting trust, it is admissible, in order to rebut the implication which might otherwise take place, but not to contradict or explain ambiguous words (d). In this case there was no latent ambiguity; and therefore such evidence was not admissible.

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3. But even upon the depositions, Colston ought to prevail. It appears that Long was guilty of concealing part of the truth in the representations he made concerning the value of the estate. 1 Bro. 440, Shirley vs. Stratton, shews that a concealment of essential facts by one party from the other will vitiate the contract. If it be said that Long gave Colston some information, why did he not give him all he knew, by which the value might be reduced, as well as that which tended to enhance it? Mr. Williams says that Gen. Lee was agent for Colston; and his knowledge was that of Colston; but not a tittle of testimony exists that he had any knowledge of the value of the estate.

Mr. *Call* here took a view of the evidence; from which he argued, that Long did not dream there would be a deficiency, and therefore made no stipulation about it; that both parties believed the estate would be worth more than $20,000; which belief on the part of Colston, was produced by representations made by Long himself; that the difference of exchange was not given as a premium for hazard, but a recompence for the expense and trouble Colston was to be at in recovering the estate; and that the $20,000 were to be deducted, (on the final ascertainment of the value of the estate,) at the above ratio from the cash value; from all which he inferred, that, upon the merits, whether on the writings or the parol evidence, Colston had paid Long as much, or more than he ought, and had done all that could reasonably be required of him.

4. But Long has not done all that he ought to have done. He and his wife have not conveyed their interest. If Mrs. Long is dead, no body but her heir can get the money from England: and if she is living, her husband or Colston cannot, without evidence of her consent(*a*). Long is bound to shew by some paper in the record that he has executed a deed, and that the privy examination and relinquishment of Mrs. Long has been taken. The grantor is bound to pay the expense of the deed.

(*a*) 2 Bro. 663, Minet vs. Hyde. 3 Bro. 237. 4 Bro. 139. 1 Anstr. 93.

Judge CARRINGTON. It is the custom of this country for the grantee to pay that expense.

Call. The doctrine is expressly otherwise in Co. Litt. The bond, I admit, states that a deed had been executed: but this is to be construed as executed by Long alone, since there is no proof that his wife had done it; and her conveyance, except by privy examination, &c. is worth nothing.

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5. The decree of the court of chancery is right, so far as it goes; for which the Chancellor himself has given able and sufficient reasons. It is objected that an account ought to have been directed: but the decree has provided for this, by reserving a right to resort to the court hereafter.

6. The court of chancery had jurisdiction; because the court of law could not have given complete relief. If no suit had been brought at common law, Colston might have gone into equity to have the value of the Chichester estate ascertained, and the writings delivered up, on his conveying to Long land sufficient. Does it make any difference that Long first went into a court of common law? If it does, the principle would apply to every case commenced at law, and would abolish injunctions to stay proceedings on judgments. Recourse was necessary to a court of equity; because there was reason to believe that the Chichester estate would be deficient, and the bill was filed upon the principle of *quia timet*. The deficiency was uncertain, the suit in England being still undetermined. A court of common law, therefore, could not have restrained the parties, until that was ascertained; and, if a judgment had been obtained, and Colston compelled to pay the money, he would have had no security for its being refunded.

It is objected, that a judgment should have been confessed, or the cause decided, before the injunction was granted.

I answer, that a confession of judgment would have defeated Colston's object. It would have been confessing that which he had denied, and which was uncertain. Injunctions before judgment are very numerous. The cases, of an heir obtaining an injunction, during the pendency of a suit against him on his ancestor's bond, and of an injunction awarded pending an ejectment, often occur (*a*.) The requiring a confession of judgment is discretionary with the court, which may lay the party under proper restrictions.

(*a*) 1 Atkins 491. 14 Vin. 423, 425.

Mr. Williams contends, that where relief can be had at law, none can be had in equity. 3 Vez. jr. 692, proves the contrary, on the ground that the nature of the relief is different in the different courts. In equity, specific performance may be decreed; the conduct of the parties, and all equitable circumstances may be considered....4 Vez. jr. 686--689, Loyd vs. Collet, shews, that where a party has let the time elapse, he has no right to insist on a lite-

ral compliance with the contract. Here, Long ought to have had the privy examination completed by a certain time; and there is no proof that he has done it at all. He has thereby lost the benefit of the contract. November, 1806. LONG *against* COLSTON.

The decree, however, is incomplete in one respect. As Long has received more money and land than the English estate is worth, the Chancellor ought to have directed him to hold the land, subject to any future decree.—With an amendment to that effect, this court ought to affirm it.

Wickham on the same side. If Colston was at all events to pay $20,000, the contract was in the nature of a policy of insurance, and ought to be governed by all the rules which are applicable to such instruments. If Colston was an insurer, he could not be liable for any risk against which he did not insure. Now it appears that the only risk contemplated was that arising from revolutions and political convulsions, not from any prospect of a deficiency in the value of the estate; for no doubt was entertained by either party of its being worth more than $20,000. No insurance, therefore, could have been intended on that subject. Is it probable that Colston, a stranger, would have insured that the fortune of Long's wife, which lay in England, and of which he knew nothing, except by information from Long himself, really amounted to $20,000? For such a contract there was no *quid pro quo*. In policies of insurance there must be a true representation, and either fraud or mistake will vitiate the contract; one of which took place in this case; for Pollard's deposition proves that Long did not make a full representation, but concealed several important circumstances. If a warranty had been intended, Long would have insisted on the largest sum, and Colston, the insurer, on the smallest. But the fact here was exactly the reverse. As Colston wanted money in England, and to dispose of as large a quantity of his Kentucky lands as possible, and Long wanted money here, Colston increased the sum as much as he could; and this accounts for the sum of $20,000 being fixed upon. It is unimportant whether the parol testimony was admissible or not; because, either with or without it, the construction of the contract would be the same.

As to the question of jurisdiction; a bill for specific performance lies for either party, and ought to be favored; for more complete justice can thereby be obtained than at law; since the damages given by a jury may be too much or too little; and in no case, do they give the thing con-

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tracted for, but money in its room. One party cannot by bringing an action at law deprive the other of his suit in equity for a specific performance. It is objected that Colston violated the covenant himself. But, if the condition of a bond given for the purchase of land is violated, will that prevent the obligor from going into equity to obtain a title?

Judge LYONS. Would not the Chancellor compel him to give a judgment before he would grant an injunction?

Wickham. This is the rule in actions for sums certain, but not in those for damages only. In the case of Morris vs. Braxton, the vendor, although not able to convey at the time stipulated, yet obtained a decree when able afterwards to convey. So, in the case of Pollard vs. Rogers, where only able to convey a part.

In those cases, although the vendors filed their bills for specific performance, they might have been sued at law, and damages recovered against them for their breach of contract.

But in this case Colston was not in fact guilty of a breach; for he was willing to convey as much land as he was responsible for *pro rata*, though he refused to convey any more; but Long demanded the whole, notwithstanding he had violated the contract on his part.

But, it is said, that Colston had not lands to convey; as the Indian title was not extinguished to some that he claimed. This objection has no weight, because if Colston is not able to convey, a compensation in damages may yet be given, (so far as he may fail,) by directing a jury to be impannelled for that purpose.

Let it even be admitted that a judgment ought to have been confessed in the first instance: yet the decree, being right on the merits, ought to be affirmed. The example of a bill of injunction where security ought to have been given and was omitted is parallel to this. In such a case, if the complainant has equity on his side, on the final hearing, the injunction may be made perpetual; and the omission of taking security, being merely matter of form, ought not to vitiate the decree.

Randolph, in reply, went into an examination of the evidence to prove that Long was no speculator; that the first overtures came from Colston, who, leagued with Gen. Lee, used every artifice to prevent Long from selling his share of the Chichester estate to any other person;....that a clause in the agreement shewed that the estate was

known to have been sold and vested in the funds ;....that all Long's right was transferred by special warranty ;.... that Colston knew the situation of the estate, and, if he meant a rateable deduction to be made, ought to have inserted a clause to that effect in the agreement; and that the design of both parties extended only to the case of an excess of the estate over £20,000; not to that of a deduction, if it should be under that sum. The event of a revolution in England ought not to be construed as the only contingency intended to be guarded against for the benefit of Long; for other contingencies, although not expressed in the agreement, were equally understood.

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1. Pothier on obligations, citing the Digest, sec. 81, says that those things, which, for the purpose of removing doubts, are inserted in contracts, shall not affect the rights of the parties in other respects. Mortimer vs. Gapper, 1 Bro. 158, shews that, where a fact is doubtful, or equally unknown to both parties, the contract will be enforced (*a*).

The cause might rest here upon the contract itself: but it was farther strengthed by the parol testimony, which he contended was admissible to explain it (*b*).

In answer to the general doctrines, relative to a deficiency in property sold, quoted from 2 Pow. Con. 196, 197, 1 Call, 316, Jolliffe vs. Hite, and Bedford vs. Hickman, he referred to 5 Burr. 2831, and 3 Bro. 451, to shew, that where a consideration has been paid, no deduction is to be allowed for a deficiency, without proof of fraud.

On the question of jurisdiction, he laid down the doctrine in the abstract, that, where a party has been brought into a court of law for violation of a contract, he shall not compel the adverse party to accept a specific performance, unless equitable circumstances should exist to authorise him to do so; and observed that none such existed here; that the remedy was complete at law, and chancery ought not to have taken jurisdiction.

The decree was also defective in compelling Long to take lands, which now had fallen immensely in value, and the titles to some of which were defective; or, indeed, any lands without a provision for ensuring the titles; and in not directing Colston to give security for any future sum of money for which he might be responsible.

Cur. adv. vult.

On Friday, the 7th of November the Judges delivered their opinions.

(*a*) See also 4 Vez. jr 849.

(*b*) Ross vs. Norvell, 1 Wash 14 1 Bro. 85. 1 Vez. 457.

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Judge TUCKER. Before I enter upon the points which I purpose to consider in this case, I shall premise, that both from the bill and the evidence, I am fully satisfied that Lee and Colston were originally partners in this bargain, probably from its first inception, previous to Long's visit to Colston's house; and that Lee was from that period the agent of both, and that whatever Lee did in the business was binding upon Colston, being matured and concluded in his presence. That Lee was probably as well informed as Long of the situation of the property in England, before the parties met at Alexandria; and that although there is a charge of misrepresentation made against Long in the bill, there is no proof of any *representation* whatever from him to Colston, in the character of a purchaser, or one treating for a purchase. That as Colston seems to have studiously concealed his participation with Lee, in the contract then in agitation between Lee and Long, and denied any intention to treat with Long for the purchase, the conversation between him and Long is not to be regarded as between persons treating about a bargain, but merely as between indifferent persons.

The original contract, after reciting the nature of Mrs. Long's title, and that the proceeds of her estate were invested in the *English funds* (not particularising which of them,) contains a covenant on the part of Long and wife, in consideration of the covenants therein after contained on the part of Colston, to assign and convey to him all the right, title and interest of Long and his wife therein, with a covenant for further assurance, &c. In consideration of which Colston agrees to pay Long $ 20,000 down, upon the execution of the contract, viz. $ 5,000 in cash, the "residue in lands situate in the state of Kentucky and "the territory N. W. of the river Ohio, to be selected, "from a schedule of *locations* and *surveys* thereto annex-"ed, and part of the covenant, by Long, for which Colston "is to be allowed two dollars per acre, and of which he is "to make every necessary conveyance in fee-simple, a-"gainst the claims of himself and his heirs, and *inasmuch* "*as some of them are only entered*, Colston to bear the "burthen and expense of their being surveyed. And fur-"ther, as the value of the said estate (in England) is *not* "*ascertained*, and the parties *mutually suppose* that its va-"lue, when ascertained, will *far exceed* $ 20,000, Colston "covenants to execute a bond to Long, to pay him what-"ever may be the excess beyond the $ 20,000, at the rate "of one pound currency, for a pound sterling, after de-

"ducting by the same ratio the £ 20,000 aforesaid." Then follow some other covenants not material to consider; then a covenant that Long and wife shall execute a cotemporary power of attorney to Colston, empowering him to receive the value of the estate, &c. but the appointment of agents in England shall be made by both parties....and then this clause—"And further, the said "Colston is to proceed with every possible dispatch to as- "certain and secure the value of the estates, thereby co- "venanted to be transferred, and to bear all expense at- "tendant thereon. *And further to avoid every opening for* "*after construction*, and render the meaning of the par- "ties as *explicit* as *possible*, it is understood that Long and "wife are *only to convey* their title and interest to the "said estates, and that of their joint and several heirs. "And that if *any change* or convulsion in the government "of Great Britain, should occur, as an *obstacle* to the *reco-* "*very of the said estates* or the proceeds thereof vested in "the funds, they are not to be contemplated as responsi- "ble therefor, and *as to the sum paid, no reimbursement*, "shall take place, and that if any such event should hap- "pen the said Colston, on the other hand is not to be "bound by his bond."

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On the same day Colston with Lee his security executed a bond to Long in the penalty of £ 100,000, in the condition of which, after reciting the former part of the agreement, as far as the stipulation to pay a pound currency, for a pound sterling of whatever should be received in England by Colston, the words of the bond proceed thus, "whereby it was *meant* that for the ENTIRE value of the "said estates or stock in the funds in sterling money of the "kingdom of G. Britain, the said Colston was *only* to give "the said Long, *only* one pound Virginia currency, for "one pound sterling, &c."

Where there is a written agreement, the whole sense of the parties is presumed to have been comprised therein, and it would be dangerous to make any addition in cases where there does not appear any fraud in leaving out any thing. This is a general rule. (5 Co. 68; 1 Fon. 200.) But the parties to this instrument have taken uncommon pains to manifest their full sense of the bargain, as expressed in the original articles of agreement, by that clause which professes to avoid every opening for after construction, & render their meaning as *explicit as possible*. If then the agreement thus concluded and explained, can

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admit of a satisfactory explanation, we are bound to give it that, and that *only* which the words will bear.

I shall premise, that the consideration and inducement to the agreement on the part of Long and wife, is not the payment of the sum of $ 20,000, in the manner proposed, as a sum or price in gross, but that he undertakes in consideration of the covenants therein after contained on the part of Colston; by which it appears clearly to my apprehension that the $ 20,000 was considered by both parties, as a partial payment *only*, for an estate, the *value and amount* of which depended upon future information and computation: for neither party professes to know the real value or amount of the estate, though both parties acknowledge their belief, that it will far exceed the value of the $ 20,000. Let us suppose a merchant anxious to purchase a large crop of wheat just cut, but not yet threshed out, was to agree with the owner of the wheat for the purchase of his whole crop, which both parties supposed would far exceed a thousand bushels, and to pay him down $ 1,000, on executing his contract, and at the same time to give his bond to the owner to pay him whatever might be the excess beyond 1,000 bushels, at the rate of one dollar per bushel, after deducting the $ 1,000 paid by the same ratio. Could any one hesitate to pronounce that this was a bargain for the crop, at the rate of one dollar per bushel, and an advance made in part payment at the rate of one dollar per bushel, and to pay for any excess at the same rate? Then would not equity say, in case the crop should fall short of 1,000 bushels, the owner must refund to the purchaser as many dollars, as the wheat falls short of the sum advanced? To my apprehension such a construction is irresistible. For as the bargain was not to pay a sum in gross, for the wheat in gross, let it hold out more or less than 1,000 bushels, but to pay according to the number of bushels, whatever number there might be above 1,000, so the principle of mutual and reciprocal benefit and loss, which enters into all contracts, in which there is any hazard which neither party has expressly taken upon himself to bear, requires there should be an abatement in case of a deficiency below the value of the sum advanced.

But it has been contended by the appellant's counsel, that the explanatory clause, at the end of the agreement, shews it was the intention of the parties that there should be no reimbursement of the $ 20,000, in any event. Let us then suppose that our wheat merchant and the owner

had added a similar explanatory clause in these words— "It is understood, that if by any accident the wheat should "take fire, and be burnt up before it is delivered, the sell- "er is not to be contemplated as responsible therefor, and, "as to the sum paid, no reimbursement shall take place, "and if any such event should happen, the buyer, on the "other hand, is not to be bound by his bond." Could this stipulation be understood as having any relation but to the destruction of the wheat *by fire?* Or could it in any manner be construed to relate to the just quantity which the whole crop should amount to? I conceive not.

The agreement then is to my mind clear, and explicit enough to shew that the £ 20,000, to be advanced, was not a price in gross, but an advance made upon the mutual idea of both parties, that the value of the estate would far exceed it, subject to a final adjustment, when the value of the estate should be finally known, at the rate of pound for pound; at which rate, in case of a deficiency, the seller was to refund, as well as to receive in case of excess—there being nothing in the agreement that shews me Colston took the risque of the amount upon himself entirely.

But it will be said that a court of equity will admit of evidence *dehors* the deed, in case of fraud, concealment, or misrepresentation, between the parties, or mistake or misapprehension by the drawer of the deed. 1 Fonb. 117 and 200, and the references. The doctrine is not denied, but its application to the present case may, I apprehend, be fairly doubted. Let it, however, be granted that it ought to be admitted in this case.

It is a maxim, that *contemporanea expositio est optima*: and any collateral fact done by the parties at the time, which serves to illustrate their meaning and intention is, in my opinion, entitled to the highest respect, where evidence *dehors* the deed is admitted to explain the intention of the parties to the contract. Such was the bond executed by Colston and accepted by Long, on the same day, and probably at the same moment, as the original agreement; whereby it is expressly declared that "the meaning "of the parties, in the original contract, was that for the "entire value of the estate or stock, Colston was *only* to "give Long *only* one pound currency for one pound ster- "ling." The repetition of the word *only* in the same sentence, and even in the same line, however unnecessary & ungrammatical, affords some evidence of the solicitude of the parties that the contract should be distinctly under-

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stood. And this explanation corresponds with and confirms my interpretation of the original agreement.

The evidence of Mr. Lewis the counsel who drew the papers, is relied on to prove that the intention of the parties was, that no reimbursement of the $ 20,000 advanced, was to take place in any event, of what nature soever; which words do not occur either in the agreement, or the bond, both which were, I presume, prepared by Mr. Lewis. To come at a fact like this, (I shall say in the words of lord Hardwicke in a similar case,) it is *certain* there ought to be the *strongest proof possible*, (1 Vez. 319.) I was directed, says Mr. Lewis, to covenant between the parties that Colston was to give Long $ 20,000 in prompt, to be discharged by $ 5,000 in cash, and $ 15,000 in military lands: Colston to be allowed two dollars per acre; 2d. if there should be any surplus value of the estate beyond the $ 20,000, Mr. Colston was to have it, every pound sterling value for a pound currency; the terms of the bargain against Long were contemplated to indemnify the purchaser against the expense in clearing out the title from the *pending law suit*, &c.; 3d. upon the final ascertainment of the value of the estate, the $ 20,000 were *to be deducted* at the same ratio from the cash value; and, 4th. the parties were only to make special warranties of the property sold and that received in payment. Such, we are told, were the contents of the notes furnished him to draw the contract by, which it has happened unfortunately, were not retained by him. If they had been retained, they, and they only must have been resorted to, to shew there was a *mistake* in the agreement, as not conforming to them. In the case of Baker vs. Paine, 1 Vez. 456; the articles of agreement in a case not very unlike this were rectified by the minutes. But here the minutes, as detailed by Mr. Lewis, correspond with the agreement. Mr. Lewis no where says he made any mistake in drawing the agreement, but enters into a long detail of his advice to Long, and the reasons upon which it was founded. He mentions, indeed, a question propounded by Gen. Lee to Long, as they were coming out of Mr. Edmund Lee's office, viz. "Mr. Long, provided we do not receive "the $ 20,000, do you mean to reimburse them?" With the answer—"*I make no such bargain.*" But these were answers to leading questions propounded by Long, and have therefore less weight with me than if Lewis had mentioned them himself; and, even then, I should have thought they might be applied to the event of a convulsi-

on or revolution in England, so as to agree with the bargain; but not by so loose a question and answer to contradict it. Lewis, by his own account, felt great solicitude for Long's interest, and was employed part of two days in drawing the papers; duplicates of which were made out by him, and executed by the parties. It would be wonderful, under such circumstances, if he *omitted* any thing through *mistake*. This is not like the case of Fleming and Willis; it approaches nearer to the case of Lady Shelburne and Lord Inchiquin, 1 Bro. 338; where parol evidence to prove a variance between articles and instructions was indeed admitted, but considered as having no operation on the case. There being no other evidence on this point, I conceive the meaning and intention of the parties is too fully expressed in the agreement itself to admit of doubt.

Much stress was laid, in the argument, on the inequality of the contract, in favor of Colston. But inequality between the sum paid and received does not of itself make the *consideration inadequate*: If it did, there would be an inadequate consideration paid, or received, on every foreign bill of exchange drawn *above* or *below par*. In this case Colston was to pay currency, pound for pound, for sterling. But when was he to receive the compensation for $ 20,000, which he was to advance? Not till after the death of Burgess Ball, who was tenant by curtesy of the English estate; nor until an adjustment of a law suit, already depending more than fifty years,---nor until other legacies were paid and discharged, and the balance could be ascertained. The first of these events, *only*, has as yet happened; and that happened three years after the contract, and might not have happened in thirty. There is nothing then in favor of Long upon this point. Whether either of the parties knew of these legacies, until the meeting with Shermer in January, 1798, more than six months after the bargain was concluded, does not, I think, very clearly appear. Be that as it may, from that period Colston had reason to doubt whether the money paid, and the lands he was to give to the amount of $ 15,000 more, would not overgo the amount of the English estate, which he was likely to receive in virtue of his bargain. And, for any thing that appears in this record, that doubt has daily acquired strength, from the information of the agents of both parties, and still remains undetermined.—Upon these grounds I am of opinion that Colston was well entitled to the aid of a court of equity; and that,

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under the circumstances of the case, the relief sought, and that which has been obtained, so far as it goes, were both proper; since thereby the contract may be fulfilled on both sides, according to their original agreement, and justice done by a fair adjustment of accounts in a court of equity; which probably could not have been effected in any other mode. That a bill for specific performance, lies as well on the part of the seller as the purchaser, is evident from the case of Langford vs. Pitt, (2 P. Wms. 630,) and Stourton vs. Meers, there cited by the master of the rolls. I am the more confident in this, because Long was apprised, as appears by the agreement, that some of the lands he was to receive had only been *entered*, and Colston must have time to *survey* them and obtain patents. The conveyances in fee-simple were demanded by *Peacock* as attorney for Long, as furnishing a ground for an action at law for breach of covenant, in September, 1798; about fourteen months after the bargain, and probably much sooner than patents could be obtained in the ordinary course of proceeding, whatever diligence Colston or his agents may have used for that purpose. Whether this was too rigorous a proceedure on the part of Long, or not, it is unnecessary to say; but I think the injunction, upon the terms *offered* was rightly awarded. Colston had performed a part of his contract to a very valuable amount, by the advance of $ 5,000. The agreement, as before observed, shews he could not possibly execute a conveyance in fee-simple for *all* the lands, part of them being only entered. It is a principle in equity that where a party is, by accident, or other circumstances beyond his own controul, prevented from executing the whole of his contract in specie, he shall be permitted to perform it as far as he can. Pollard vs. Rogers, in this court, was cited by Mr. Wickham to this effect. And, even if he can now make a title to the lands, it seems reasonable he should be permitted so to do; as in Langford vs. Pitt, and Stourton vs. Meers above referred to. Colston, as I understand his *offer* in his bill, has actually executed a conveyance for so much of the lands, which Long was to have of him, as is equal to the balance of the $ 20,000; which conveyance still remains *in full force*. If there were any of the lands selected by Long not comprised in that conveyance, perhaps the court ought to permit him to ascertain his damages at law for the amount of the lands so omitted. But still I apprehend no execution for the same ought to be permitted, but the verdict be cer-

tified into the chancery, there to wait the final issue of the cause, upon a settlement of the accounts between the parties,—with this difference, (if upon examination it should appear necessary,) I am of opinion that the decree be affirmed.

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Judge ROANE. This is a bill of injunction exhibited by the appellee praying to arrest the proceedings in an action of covenant brought against him by the appellant in the District Court of Winchester. While that action was yet pending and undetermined, the Chancellor awarded the injunction, and, without requiring the appellee to confess a judgment at law, transferred to his tribunal the entire cognizance of the cause, which involved the construction of a contract. By that contract the appellant had bound himself to convey to the appellee, his and his wife's title to an estate in England called the Chichester estate; whereupon the appellee was to pay him down five thousand dollars in cash, and fifteen thousand dollars in military lands, at two dollars per acre, and to pay him one pound currency for every pound sterling which the said estate (which was in the English funds) should, when finally settled, be found to amount to, over and above the said sum of twenty thousand dollars. So far the parties are agreed in their construction of the contract: but the appellee contends that, in the event, which is now suggested to have taken place, of the estate's falling short of that sum, a proportional reimbursement should be made out of the said sum of twenty thousand dollars; whereas the appellant contends that in no event was he liable to submit to such an abatement.

This is the grand question between the parties. The covenant on the part of the appellant is that he would convey the right to the English estate; (which, in the declation in the action at law, is alledged to have been done, and which he might in that action have duly shewn to have been done, had not the progress thereof been arrested;) and the covenant, on the part of the appellee, the breach whereof is now complained of, is, that he has failed to transfer the military lands, which by the contract were to have been immediately and promptly conveyed. Notwithstanding the existence of this action upon *this* covenant, another action would lie on the same contract in behalf of the appellant, in the event of an excess beyond the twenty thousand dollars, and a non-compliance on the part of the appellee with his stipulations in relation thereto; and an action would also have lain in favor of the ap-

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pellee, (if his construction of the contract be correct,) in the event of the value of the estate falling short of the before-mentioned sum. At the same time it is readily admitted that in this very action for damages for not furnishing the stipulated deposit, it was competent to the appellee to exhibit to the court and jury and contend for his construction of the contract, in this particular, and to shew the existence of an actual deficiency in the estate, by way of mitigation of damages.

But the appellee neither choosing to do this by way of defence in the aforesaid action, nor to rely on it in any future action to be brought by him against the appellant, grounded on the event which is now suggested to have taken place, has evoked the subject from the court of law to the court of equity, and prays the latter tribunal to construe and decide upon the contract.

A translation of this kind can only be justified in the case before us, by particular grounds of equity existing on the part of the appellee, or by reason of the verity of that general and broad proposition, which is stated in the commencement of the decree in question.

In examining into the particular grounds in the case before us, it cannot be pretended that the appellee was under any necessity of coming into a court of equity for relief against any forfeiture incurred by him in relation to the military lands contracted to be conveyed, or the like; 1st. because he expressly states in his bill "that when the "appellant applied to him for a conveyance of the said "land according to contract, he offered to do so provided "the appellant would agree to reconvey or be otherwise "responsible in case of a deficiency of his claim on the "Chichester estate;" thereby admitting his ability to convey, and requiring, as a condition thereof, a new or explanatory stipulation on the part of the appellant; 2d. because the military lands aforesaid being holden by the appellant by entries and surveys only, in most instances, if not all, and this known to the appellant at the time of the contract, he could never have expected from the appellee more than an immediate transfer of his rights thereto, or, at most, regular deeds, for them hereafter, when the titles should be completed; and therefore such a transfer would have been a compliance on the part of the appellee with his stipulation, and received as such in the trial at law; and, 3d. because if there were any of those lands, selected by the appellant, to which the appellee has not and perhaps never can obtain a title, (as is alledged by

him to be the case in relation to two entries in the name of Samuel Carey; see his letter to the appellant, of March 18th, 1799;) this circumstance, so far from affording *him* a ground to come into a court of equity for a specific performance, would perhaps have been a reason for *confining* his adversary to his action at law for damages: for it is said in Cudd against Rutter, 5 Viner. 540 "that the court in "case of a contract for the sale of land, which the party has "not at the time of the contract, will not decree a specific "performance of the agreement as to the land, but leave "the buyer to recover his damages at law for non-perform-"ance of the agreement."

With as little reason can it be said that the appellee might go into the court of equity on the ground on which bills of quia timet are usually granted.

By his contract, he was bound to convey the military lands immediately, unclogged with any condition whatsoever; and the appellee trusted to the appellant's *personal* responsibility to make good the deficiency, (if that event was contemplated and provided for in the contract;) but the ground he now takes in his bill goes to clog the transfer of the *lands themselves* with a new condition of reimbursement. This ground of complaint is moreover untenable, because it is as reasonable that the appellee should rely on the personal responsibility of the appellant in case of deficiency, as that, in case of excess, the appellant should rely on that of the appellee; who had, from the moment of the signature of the contract, the estate of the appellant in his hands. It appears from the contract that both parties were safe and responsible men, and whatever the true construction of the contract may be as to the appellant's liability to make reimbursement in case of deficiency, there is no pretence to say that such liability was attached to the land by way of *lien*. These remarks are made in objection to the appellee's coming into a court of equity *on this ground*: at the same time it is readily admitted that if the cause were properly before the court of equity, and ripe for a final decision, by reason of the English estate being fully and finally settled and ascertained, it might be proper for equity, which delights to do *complete* justice, to settle the case by making an abatement in case of deficiency out of the military lands themselves, which are contracted to be conveyed.

I come now to consider the general and broad proposition contained in the commencement of the Chancellor's decree. I will premise that I highly approve of the jurisdiction of courts of equity on the point in question, as settled

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by successive and well-weighed decisions; so far as it is auxiliary to the jurisdiction of courts of law; and so far as it goes to give to parties, *who wish it*, the specific execution of their agreements. But this jurisdiction must have limits: it ought not to ingulph and destroy the salutary jurisdiction of the common law. I wish not to see this small and precious germ, which, within times not far remote, took root, and was with difficulty nourished as a wholesome and goodly plant, yielding its friendly aid to the soil on which it grew; now outstrip its proper size, outrage its own nature, and like the far-famed *Upas tree*, by its deliterious effluvia administer death and desolation to all around it. I wish not to yield up every thing to that encroaching jurisdiction, which knows not the inestimable trial by jury, and is blind to the incalculable superiority of *viva voce* testimony. If there is any advantage arising from the union in this court, of the common law and chancery jurisdictions, it is not the least that such union affords a check against the proneness of all men in all situations to advance and extend the sphere of their own authority. Under this organization, this court, taking side with neither of the rival jurisdictions is free to restrain them both within their proper limits.

The broad proposition now in question is this, that in case of a specific agreement, although the party grieved may have elected to proceed at law for damages arising from a breach thereof, yet, as he *might* have resorted to equity for a specific performance, and as in equity remedies ought to be reciprocal, the aggrieving party may compel his adversary to abandon his common law remedy and hold him down to a remedy for specific performance.

Whether this proposition, if true in the extent here contended for, does not go to the utter annihilation of the common law jurisdiction in such cases, and make a most important innovation in our system of jurisprudence, I will briefly enquire?

In the excellent treatise of equity, upon which Fonblanque has annotated, we are told, vol. 1, p. 27, that formerly the law of England was very defective in not providing for a specific performance of agreements:—"but it proving "a great hardship in particular cases to be left only to the "uncertain reparation by damages, which the *personal es-* "*tate* perhaps may not be able to satisfy, courts of equity "therefore, where there was a sufficient consideration, did, "*in aid of the common law*, compel a specific performance." Nothing is more clear than that this provision was introduced in *favor* of the person aggrieved by the breach of the

agreement; as is manifest from what is said about the failure of the personal estate, &c.; nor than that this provision was (as it is expressed,) *in aid* and not *in exclusion* of the jurisdiction of the common law:—Yet we are told, ib. p. 31, that "the common lawyers continually poured out their complaints against this incroachment, as they imagined it, on the ancient municipal laws. Loud indeed would their complaints have been, if, instead of the just and reasonable pretension then advanced and now sanctioned by the concurrence of ages, this gigantic innovation had then been meditated.

I take it therefore to be a well established principle, that after a breach, a plaintiff may elect to proceed at law for reparation in damages, and that he cannot *thereafter* be compelled to go for the thing in specie *unless he wants it* (1 Fonb. 29, 139.—2 Brown's Reports 343, Errington *vs* Annesley, &c.) or unless some *particular* grounds of equity exist, on behalf of the party breaking the contract, excusing and relieving against such breach, and shewing that, according to the principles of equity, the contract ought, nevertheless, to be performed in specie.

It was argued, but ought not seriously to have been alledged, by the appellee's counsel, that the sustaining the action at law injuriously converted the appellants' claim from land into money. The answer is, 1st. that this objection is as broad and untenable as the general proposition just examined; and 2dly, that it results from the principles of law and the contract of the parties, that, in case of breach thereof, the appellee has promised to pay to the appellant as much *money* as should be assessed by a jury, for reparation of the injury: his original contract, followed up by a breach thereof, completely estops him from making the objection. It may truly be said that, in contracts for so fluctuating a species of property, (in point of value,) as those military lands were, *time* and punctuality are all important to the buyer; and that the default of the seller in not making a due transfer at the time, when the *agreed price* might have been *procured* therefor in the market, shall not prejudice the buyer in the event, which is alledged to have taken place, of an enormous depreciation in the value of military lands. If a loss is thereby sustained by the appellee in the present instance, it is a loss without an injury, and arose from his own act in not performing his agreement by transferring the lands, but, instead thereof, keeping them in his own hands and at his own risque.

As to the objection, going to the uncertainty of a repara-

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tion in damages, it applies *equally*, at least, in all other cases but does not overrule the general doctrine of the law giving the action. In the case before us, that objection has little weight, for the parties have agreed on the price of the lands in question: and, indeed, in all cases, capricious or injurious assessments of damages by juries are controlable by the superintending power of the courts. The objection therefore ought to be wholly disregarded in the case before us.

Such are the grounds of my opinion in the present case.

Not believing that the appellee was competent to come into a court of equity, when he exhibited his bill for an injunction, or that such court ought to have taken cognizance of his case (the court of law being the proper tribunal to construe the contract, and determine the action pending before it,) I have deemed it *premature and unnecessary* to enter at all into the merits of the *contested* question arising out of the contract. I have only incidentally examined that contract, in connexion with other circumstances, to enable me to determine whether the appellee ought to have obtained foot-hold, and received countenance in the court of equity. On a full consideration of the case, I think that he ought not; but that his application for an injunction should have been rejected, and his bill dismissed;—which (reversing all the subsequent proceedings in chancery,) ought now to be the judgment of this court.

Judge CARRINGTON. I am of opinion that the injunction obtained by Colston was *premature*, the value of the English estate being not yet finally ascertained. It ought therefore to be dissolved, but without prejudice to any suit which he may hereafter bring to be compensated for the deficiency, when the amount thereof shall have been ascertained.

Judge LYONS. Neither a court of equity nor of law can vary men's wills or agreements. (a) Courts should endeavor to understand them truly, but not to extend or abridge them. They may construe equitably when words admit of doubt, but cannot controul a lawful stipulation or contract, nor relieve against stated damages.

(a) 3. Tuck. Bl. 485.

What was the contract in this case? That Colston should pay Long twenty thousand dollars upon the execution of a conveyance for transfering to the former all the right of the latter and of his wife to what was called the Chichester estate in England; that he should pay in cash five thousand dollars, and the balance in military lands; and, as the value of the Chichester estate was not ascertained, but supposed to exceed twenty thousand dollars, Col-

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ston was to execute a bond to pay, at the rate of currency for sterling, for its excess above that sum. Was not this contract lawful and sufficiently certain? The bond given for excess recites the agreement, and explains its meaning to be, that, for the entire value of the estate or stock, Colston was only to give currency for sterling. Its condition was that Colston should pay for whatever might eventually be obtained over and above twenty thousand dollars. Long and wife conveyed the English estate, and demanded performance of the agreement by Colston, who refused to convey the military lands, unless Long would promise to reconvey in proportion to what the English estate, when its value was ascertained, should fall short of six thousand pounds sterling, which Long refused to do, as that was no part of his contract: upon which Long brought an action of covenant at law for the breach of the agreement, and Colston brought a suit in Chancery to injoin him from proceeding upon it.

An injunction was granted and made perpetual. The question is whether Colston, according to his agreement, ought not to have paid the twenty thousand dollars, immediately on Long's making him the deed, and whether he had a right to any aid or relief in equity, until the value of the English estate was finally ascertained?

Long did not agree to wait for that; but was to receive the twenty thousand dollars immediately, and says he was not to refund any part of it in case of deficiency. But that is not the present question; for that can be decided only when the value of the English estate shall be finally ascertained in England.

I think Long had a right to the twenty thousand dollars immediately on executing the deed to Colston, and was not obliged to enter into a new contract for refunding in case of deficiency; that he had a right to sue at law for the breach of the original contract; and that Colston was premature with his bill before the value of the English estate was finally ascertained according to the agreement.

I am therefore of opinion that the injunction should be dissolved, and the bill dismissed, without prejudice to any other suit he may bring in equity after the value of the English estate shall be finally ascertained.

The decree of the court was that the injunction should be dissolved and the bill dismissed without prejudice.

Friday, 7th November.

HUDGINS *against* WRIGHTS.

Where *white* persons or native American *Indians* or their descendants in the maternal line are claimed as slaves, the *onus probandi* lies on the claimant; but it is otherwise with respect to native *Africans* and their descendants, who have been and are now held as slaves.

It seems that no native American Indian could be made a slave under the laws of Virginia, since the year 1691.

In suits for freedom, a variance between the evidence and the case stated by the plaintiff will not be regarded by the court: but the decision will be according to the rights of the parties, and the case made out by the evidence at the trial.

THE appellees, in this case, which was an appeal from the High Court of Chancery, were permitted to sue *in forma pauperis*. The appellant being about to send them out of the state, a writ of *ne exeat* was obtained from the chancellor, on the ground that they were entitled to freedom.—In their bill, they asserted this right as having been descended, in the maternal line, from a free Indian woman; but their genealogy was very imperfectly stated. The time of the birth of the youngest was established by the testimony; and the characteristic features, the complexion, the hair and eyes were proven to have been the same with those of whites. Their genealogy was traced back by the evidence taken in the cause, (though different from that mentioned in the bill) through female ancestors, to an old Indian called *Butterwood Nan*. One of the witnesses who had seen her, describes her as an old *Indian*. Others prove, that her daughter *Hannah*, had long black hair, was of the right Indian copper color, and was generally called an Indian by the neighbors, who said she might recover her freedom if she would sue for it; and all those witnesses deposed that they had often seen Indians. Another witness, *(Robert Temple,)* whose deposition was taken on the part of the appellant, proves that the *father* of *Butterwood Nan* was said to have been an Indian, but he is silent as to her mother.

On the hearing, the late chancellor perceiving from his own view, that the youngest of the appellees was perfectly white, and that there were gradual shades of difference in color between the grandmother, mother, and grand-daughter, (all of whom were before the court;) and considering the evidence in the cause, determined that the appellees were entitled to their freedom; and, moreover, on the ground that freedom is the birth right of every human being, which sentiment is strongly inculcated by the first article of our "political catechism," the bill of rights,—he laid it down as a general position that whenever one person claims to hold another in slavery, the *onus probandi* lies on the claimant.

Randolph, for the appellant. The ground on which the appellees claim their freedom is, that they are lineally descended from a free Indian woman. On the other side it is contended, that they are descended from a negro woman by an Indian. Although the circumstance of their being *white* operated on the mind of the chancellor, who decreed their freedom; yet as the whole of the testimony proved

them to have been descended from a slave, the presumption on which that decree was founded must fail.

Whether they are *white* or not, cannot appear to this court *from the record.* They have asserted their right to freedom on very different grounds; and have not, in their evidence, made out the genealogy stated in their bill.

If they could derive their descent from Indians in the maternal line, still it will be found from the evidence that their female ancestor was brought into this country between the years 1679 and 1705, and under the laws then in force might have been a slave.

Judge TUCKER. Is not that a mistake? The act of 1705, in the clause which respects a free trade with all Indians whatsoever, is a literal transcript from an act of 1691; the title of which is preserved in the edition of 1733.*

Randolph. In all the cases decided by this court on the present question, the act of 1705, has been considered as restricting the right of making slaves of Indians: and those cases are authority with me.

Geo. K. Taylor, for the appellees. This is not a common case of mere *blacks* suing for their freedom; but of persons perfectly *white.* The peculiar circumstances under which the bill was drawn, will readily account for any inaccuracies which may appear in stating the genealogy of the appellees. But would it have been prudent or even necessary to delay the cause, by an amended bill?

He then took a circumstantial view of the evidence, and inferred that it clearly proved the appellees to have descended from an *Indian stock:* all the witnesses deposed to the fact that the female ancestor under whom they claimed, was "of the right Indian copper color," with long black hair; that she was called an Indian in her master's family, and by the neighbors generally, who said she might get her freedom if she would sue for it; and many of them had *often* seen Indians. What more than strong characteristic features would be required to prove a person *white?*

If, in *fact*, the appellees are descended from Indians, it is incumbent on the appellant to prove that they are slaves; the appellees are not bound to prove the contrary.

From the beginning of the world till the year 1679, all Indians were in *fact*, as well as *right*, free persons. In that year an act passed declaring Indian prisoners taken in war to be slaves: and in 1682, another, that Indians sold to us

If a *female* ancestor of a person asserting a right to freedom is proved to have been an Indian, it seems incumbent on those who claim such person as a slave to shew that such ancestor, or some female from whom she descended, was brought into Virginia between the years 1679 & 1691, and under circumstances, which according to the laws then in force, created a right to hold her in slavery.

* *See Tucker's Black. Vol. 1, part 2, note to Appendix, pa. 47.*

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by neighboring Indians and others trading with us should be slaves. These acts remained in force (till 1691, as supposed by one of the judges, or at farthest,) till 1705, when it has been decided they were repealed.

As *all* Indians were free, except those brought into this country within the periods and under the circumstances just mentioned, the appellant must bring the appellees within those *exceptions* to be entitled to their services as slaves.—Not a case can be shewn from the books, where a person claiming under an exception, must not bring himself within it. This is the law with respect to the act of limitations, and many others.

Having proved the *descent* of the appellees to have been from Indians, as he conceived, he then undertook to prove, from the course of nature, and the early periods at which Indians, unrestrained by a sense of modesty, propagate their species, that the appellees, by *ascent*, could trace their genealogy back to Indians, who must have been bro't into this country since the year 1705.

Randolph in reply. The circumstance of the appellees' being *white*, has been mentioned, more to excite the feelings of the court as *men*, than to address them as *judges*.

In deciding upon the rights of *property*, those rules which have been established, are not to be departed from, because *freedom* is in question. The *allegata et probata* ought surely to be attended to; as the appellant has not had an opportunity of answering the pedigree stated in the bill. But if he were compelled to go into evidence, without regard to the allegations of the bill, he was prepared to shew that the weight of it was with the appellant.

He then endeavored to shew, from the testimony, that the original Indian stock from which the appellees descended, was derived from the *paternal* line. They are bound to prove that they are descended from a free Indian woman. It has been uniformly decided in this court, that the maternal line must be established before the *onus probandi*, is thrown on the other side.

Cur. adv. vult.

Tuesday Nov. 11th, the judges delivered their opinions.

Judge TUCKER.—In this case the paupers claim their freedom as being descended from Indians entitled to their freedom. They have set forth their pedigree in the bill, which the evidence proves to be fallacious. But as there is no Herald's Office in this country, nor even a Register of births for any but white persons, and those Registers are either all lost, or of all records probably the most im-

perfect, our Legislature even in a writ of *Praecipe quod reddat* has very justly dispensed with the old common law precision required in a Writ of Right, and the reason for dispensing with it in the present case is a thousand times stronger. In a claim for freedom, like a claim for money had and received, the plaintiff may well be permitted to make out his case on the trial according to the evidence.

What then is the evidence in this case? Unequivocal proof adduced perhaps by the defendant, that the plaintiffs are in the maternal line descended from Butterwood *Nan* an old *Indian* woman;—that she was 60 years old in the year 1755, or upwards;—that it was always understood as the witness *Robert Temple* says that her *father was an Indian*, though he cautiously avoids saying he knew, or ever heard, who, or what, her mother was. The other witness *Mary Wilkinson*, the only one except *Robert Temple* who had ever seen her, describes her as an *old Indian*: and her testimony is strengthened by that of the other witnesses, who depose that her daughter *Hannah* had long black hair, was of a copper complexion, and generally called an *Indian* among the neighbors;—a circumstance which could not well have happened, if her mother had not had an equal, or perhaps a larger portion of Indian blood in her veins. As the rule *partus sequitur ventrem* obtains in this country, the deposition of *Robert Temple* as to who was reputed to be the *father* of Butterwood Nan, *without noticing her mother*, is totally irrelevant to the cause. It could not serve the complainant, *a fortiori*, it shall not prejudice her. It was, perhaps, intended as a sort of negative pregnant. But it has not even the tythe of that importance in my estimation.

In aid of the other evidence, the chancellor decided upon his own view. This, with the principles laid down in the decree, has been loudly complained of.

As a preliminary to my opinion upon this subject, I shall make a few observations upon the laws of our country, as connected with *natural history*.

From the first settlement of the colony of Virginia to the year 1778, (Oct. Sess.) all negroes, Moors, and mulattoes, except Turks and Moors in amity with Great Britein, bro't into this country by sea, or by land, were SLAVES. And by the uniform declarations of our laws, the descendants of the *females* remain slaves, to this day, unless they can *prove a right* to freedom, by actual emancipation, or by descent in the maternal line from an emancipated female.

By the adjudication of the general court, in the case of *Hannah and others* against *Davis*, April term 1777, all A-

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merican Indians brought into this country since the year 1705, and their descendants in the maternal line are *free*. Similar judgments have been rendered in this court. *(a)* But I carry the period further back, viz: to the 16th day of April 1691, the commencement of a session of the General Assembly at which an act passed, entituled "*An Act for a free trade with Indians*," the title of which, (chap. 9.) will be found in the edition of 1733, pa. 94: And the enacting clause of which, I have reason to believe is in the very words of the act of 1705, upon which this court have pronounced judgment in the cases referred to. I will here mention those reasons. On the trial of a similar question on the *Eastern* shore, two copies of *Purvis's* edition of the laws of Virginia, were produced, At the end of both was added a manuscript transcript of all the acts of assembly subsequently passed for a series of years; the titles, number of chapters, &c. perfectly agreeing with the titles, number and order in which they are printed in the edition of 1733. In *one* of these copies (both evidently of ancient date, and as I think *both* attested by the *Secretary of the colony*,*) I found the enacting clause in the same precise words, as they stand in the act of 1705. In the other copy, the leaf on which that act must have been transcribed, was with one, or at most two others, *evidently torn out*: probably with a view to hide the act from the scrutinizing eye of a court. I think it highly probable, that at that period, the county courts were furnished with the laws of the colony in this mode; there being at that time no printing presses in Virginia,—*Purvis's* collection being printed in England. I have myself a mutilated copy of the same character and description,—but those in whose possession it had been, had torn out almost an hundred pages at the beginning, and so many at the end as not to leave the act in question, before I became possessed of it. These are my reasons for referring the commencement of the law in question to so remote a period: for the acts of 1705, were like those of 1792, a digest of the former laws of the colony, rather than a new

(a) 1 Wash. 128. *Jenkins* vs. *Tom.* Ibid 239. *Coleman* vs. *Dick & Pat.*

* *The* attestation *of these acts was stated from memory. Since delivering the above opinion, I have seen another copy of* Purvis's *collection of the Laws, to which is subjoined a continuation of the acts of Assembly*, in manuscript, *for two succeeding sessions, but not as far down as the act of* 1691. *The acts of each of those sessions are attested by the* Clerk of the Assembly; *which may probably be the case with those to which I have before alluded.*

code.—By an act passed in the year 1679, it was, for the better *encouragement of soldiers*, declared that what *Indian prisoners* should be taken in a war in which the colony was then engaged should be free purchase to the soldier taking them. In 1682, it was declared that all servants brought into this country, by sea or land, not being Christians, whether negroes, Moors, mulattoes, or Indians, except Turks and Moors in amity with Great Britain; and all Indians which should thereafter be sold by neighboring Indians or any others trafficking with us, as *slaves*, should be slaves to all intents and purposes. The General Court held, (and I presume this court, consisting nearly of the same judges, have done the same,) that the passing the act authorising a free and open trade for all persons, at all times, and at all places, with *all* Indians whatsoever, did repeal the acts of 1679 and 1682. I concur most heartily in that opinion; referring the commencement of that act to 1691 instead of 1705, for the reasons mentioned. Consequently I draw this conclusion, that all American Indians are *prima facie* FREE: and that where the fact of their nativity and descent, in a *maternal* line, is satisfactorily established, the burthen of proof thereafter lies upon the party claiming to hold them as slaves. To effect which, according to my opinion, he must prove the progenitrix of the party claiming to be free, to have been brought into Virginia, and made a slave between the passage of the act of 1679, and its repeal in 1691.

All *white persons* are and ever have been FREE in this country. If one *evidently white*, be notwithstanding claimed as a slave, the proof lies on the party claiming to make the other his slave.

Though I profess not an intimate acquaintance with the natural history of the human species, I shall add a few words on the subject as connected with the preceding laws.

Nature has stampt upon the African and his descendants two characteristic marks, besides the difference of complexion, which often remain visible long after the characteristic distinction of color either disappears or becomes doubtful; a flat nose and woolly head of hair. The latter of these characteristics disappears the last of all: and so strong an ingredient in the African constitution is this latter character, that it predominates uniformly where the party is in equal degree descended from parents of different complexions, whether white or Indians; giving to the jet black lank hair of the Indian a degree of flexure, which never fails to betray that the party distinguished by it, cannot trace his lineage purely from the race of native Americans. Its operation

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is still more powerful where the mixture happens between persons descended equally from European and African parents. So pointed is this distinction between the natives of Africa and the aborigines of America, that a man might as easily mistake the glossy, jetty cloathing of an American bear for the wool of a black sheep, as the hair of an American Indian for that of an African, or the descendant of an African. Upon these distinctions as connected with our laws, the burthen of proof depends. Upon these distinctions not unfrequently does the evidence given upon trials of such questions depend; as in the present case, where the witnesses concur in assigning to the hair of *Hannah*, the daughter of *Butterwood Nan*, the long, straight, black hair of the native aborigines of this country. That such evidence is both admissible and proper, I cannot doubt. That it may at sometimes be *necessary* for a judge to decide upon his own view, I think the following case will evince.

Suppose three persons, a black or mulatto man or woman with a flat nose and woolly head; a copper-colored person with long jetty black, straight hair; and one with a fair complexion, brown hair, not woolly nor inclining thereto, with a prominent Roman nose, were brought together before a judge upon a writ of *Habeas Corpus*, on the ground of false imprisonment and detention in slavery: that the only evidence which the person detaining them in his custody could produce was an authenticated bill of sale from another person, and that the parties themselves were unable to produce any evidence concerning themselves, whence they came, &c. &c. How must a judge act in such a case? I answer he must judge from his own view. He must discharge the white person and the Indian out of custody, taking surety, if the circumstances of the case should appear to authorise it, that they should not depart the state within a reasonable time, that the holder may have an opportunity of asserting and proving them to be lineally descended in the maternal line from a female African slave; and he must redeliver the black or mulatto person, with the flat nose and woolly hair to the person claiming to hold him or her as a slave, unless the black person or mulatto could procure some person to be bound for him, to produce proof of his descent, in the maternal line, from a *free female ancestor*.—But if no such caution should be required on either side, but the whole case be left with the judge, he must deliver the former out of custody, and permit the latter to remain in slavery, until he could produce proofs of his right to freedom. This case shews my interpretation how far the *onus*

probandi may be shifted from one party to the other: and is, I trust, a sufficient comment upon the case to shew that I do not concur with the chancellor in his reasoning on the operation of the first clause of the Bill of Rights, which was notoriously framed with a cautious eye to this subject, and was meant to embrace the case of free citizens, or aliens only; and not by a side wind to overturn the rights of property, and give freedom to those very people whom we have been compelled from imperious circumstances to retain, generally, in the same state of bondage that they were in at the revolution, in which they had no *concern*, *agency* or *interest*. But notwithstanding this difference of opinion from the chancellor, I heartily concur with him in pronouncing the appellees *absolutely free*; and am therefore of opinion that the decree be affirmed.

Judge ROANE. The distinguishing characteristics of the different species of the human race are so visibly marked, that those species may be readily discriminated from each other by mere inspection only. This, at least, is emphatically true in relation to the negroes, to the Indians of North America, and the European white people. When, however, these races become intermingled, it is difficult, if not impossible, to say from inspection only, which race predominates in the offspring, and certainly impossible to determine whether the descent from a given race has been through the paternal or maternal line. In the case of a *Propositus* of unmixed blood, therefore, I do not see but that the fact may be as well ascertained by the Jury or the Judge, *upon view*, as by the testimony of witnesses, who themselves have no other means of information:—but where an intermixture has taken place in relation to the person in question, this criterion is not infallible; and testimony must be resorted to for the purpose of shewing through what line a descent from a given stock has been deduced; and also to ascertain, perhaps, whether the coloring of the complexion has been derived from a negro or an Indian ancestor.

In the case of a person visibly appearing to be a negro, the presumption is, in this country, that he is a slave, and it is incumbent on him to make out his right to freedom: but in the case of a person visibly appearing to be a white man, or an Indian, the presumption is that he is free, and it is necessary for his adversary to shew that he is a slave.

In the present case it is not and cannot be denied that the appellees have entirely the *appearance* of white people: and how does the appellant attempt to deprive them of the blessing of liberty to which all such persons are entitled? He

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brings *no* testimony to shew that any ancestor in the female line was a *negro* slave or even an *Indian rightfully* held in slavery. Length of time shall not bar the right to freedom of those who, *prima facie*, are free, and whose poverty and oppression, (to say nothing of the rigorous principles of former times on this subject,) has prevented an attempt to assert their rights. But in the case before us, there has been no acquiescence. It is proved that *John*, (a brother of *Hannah*,) brought a suit to recover his freedom; and that *Hannah* herself made an almost *continual claim* as to her right of freedom, insomuch that she was threatened to be whipped by her master for mentioning the subject. It is also proved by *Francis Temple* (perhaps the brother of *Robert*) that the people in the neighborhood said "that if she would try for her freedom she would get it." This general reputation and opinion of the neighborhood is certainly entitled to *some* credit: it goes to repel the idea that the given female ancester of *Hannah* was a *lawful* slave, it goes to confirm the other strong testimony as to *Hannah's* appearance as an Indian. It is not to be believed but that *some* of the neighbors would have sworn to that concerning which they *all* agreed in opinion; and, if so, *Hannah* might, on their testimony, have perhaps obtained her freedom, had those times been as just and liberal on the subject of slavery as the present.

No testimony can be more complete and conclusive than that which exists in this cause to shew that *Hannah* had every appearance of an Indian.

That *appearance*, on the principle with which I commenced, will suffice for the claim of her posterity, unless it is opposed by counter-evidence shewing that some *female* ancester of her's was a *negro* slave, or that *she* or some female ancestor, was *lawfully* an Indian slave. As to the first, there is no kind of testimony going to establish it. *Robert Temple* is not only entirely silent as to the color and appearance of the mother of *Nan* the mother of *Hannah*, but also as to that of *Nan* herself. The testimony of this witness, (to say nothing of his probable interest in the question,) is not satisfactory. His memory seems only to serve him so far as the interest of the appellant required. If *Hannah's* grandmother (the mother of *Nan*) were a *negro*, it is impossible that *Hannah* should have had that entire appearance of an Indian which is proved by the witnesses.—If they tell the truth, therefore, *Hannah's* grandmother was not a *negro* slave. This is more especially the case, if the father of *Hannah* were other than an Indian, and it is not

proved nor can be *presumed*, that, in this country, at that time, her father was an Indian: in that case, *Hannah* would have had so little Indian blood in her veins, as not to justify the character of her appearance given by the witnesses. The mother and grandmother of *Hannah* must therefore be taken to have been Indians: but this will not suffice for the appellant unless they (or one of them) be shewn to have been Indian *slaves*.

This court in the case of *Coleman* vs *Dick and Pat*, *(b)* was of opinion that, since the year 1705, no American Indian could be reduced to a state of slavery: and if the act of 1705 had been previously enacted in 1691, as it would seem by the information of the manuscript act given by the judge who preceded me, the epoch on this subject would be carried back to that year; which would completely overreach the date of the birth of old Nan and exclude every *possibility* of doubt on the subject. But, even under the act of 1705, the calculations and inductions of the appellees' counsel have entirely satisfied me that *Nan could not* have been brought into this country *prior* thereto. The chancellor was and we are now in the place of a jury: we have more power than the court had in the case of *Coleman*, vs *Dick and Pat*, who were acting upon a special verdict; and I will not only presume that *Nan*, (if *brought into* this country, which, however, is not shewn to have been the case, was an *American* Indian, but was brought in *posterior* to the year 1705.

(*b*) 1 Wash. 233.

But this is taking a stronger ground than is necessary to sustain the claim of the appellees: the appellant to prevail in this cause must shew, on his part, that *Nan* or some other female ancestor was brought into this country at a time, and under *circumstances*, which created a lawful right, under the then existing laws, to hold her and her posterity in slavery.

As to the variance in this instance between the case made by the evidence, and that stated in the bill, there is nothing in it. The liberality admitted in suits for freedom by this court will certainly justify the appellees in meeting the appellant on the ground *he* has taken, which they contend, and will establish by the judgment of this court, will suffice to justify their claim to freedom.

I am therefore of opinion that the appellees, on these grounds, are entitled to their freedom, and that the decree ought to be affirmed.

Judges FLEMING, CARRINGTON and LYONS President, concurring, the latter delivered the decree of the court as follows:

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"This court, not approving of the chancellor's principles "and reasoning in his decree made in this cause, except so "far as the same relates to white persons and native Ame- "rican Indians, but entirely disapproving thereof, so far as "the same relates to native Africans and their descendants, "who have been and are now held as slaves by the citizens "of this state, and discovering no other error in the said "decree, affirms the same."

THE COMMONWEALTH *against* WALKER'S EX'OR.

The commonwealth is not responsible for the nominal amount of money paid into the Loan-Office in discharge of British debts; but only for its value according to the scale of depreciation.

THOMAS WALKER on the 28th of November, 1777 and 3rd of April 1778, paid into the Loan-Office certain sums of money, and obtained the proper certificates; for which the governor gave him a receipt on the 25th of May, 1779, in discharge of a British debt. After the act of 1796, upon the subject of such payments, his executor applied for certificates for the said sums and interest; but the treasurer insisted upon reducing them by the scale of depreciation of May 1779. This was at first objected to; but as the treasurer persisted, the executor received certificates for the amount according to the scale; expressly declaring, however, that it should not prejudice his claim to the original sums and interest. He afterwards applied to the auditor for a warrant for the difference betwen the sum received and that to which he conceived himself entitled, but was refused it; in consequence of which he appealed to the High Court of Chancery; where it was decreed that the Auditor should issue warrants for the *value* of the sums according to the scale at the times when they were paid into the *Loan Office*: from which decree an appeal was taken to this court.

The scale, in such cases, is to be applied at the time of the payments: not at the date of the governor's receipt for the certificates of those payments.

Attorney General, for the commonwealth. The question to be decided by this court is, whether the scale of depriciation is to be applied at the time the money was *deposited in the Loan Office*, or when it was *paid in discharge of the British debt*, by taking the governor's receipt for that purpose.

It will, indeed, be contended by the counsel on the other side, that the debt ought not to be scaled at all. This is an important question, but it is one on which all men seem to have agreed. During our revolutionary war the property of British subjects, in this state, was sequestered, and by an act passed in 1777, citizens of this commonwealth owing money to a subject of *Great Britain* were allowed to pay it into the Loan Office, taking a certificate in the name of the

creditor, with an endorsement of the commissioner of loans, expressing the name of the payer, which certificate was to be delivered to the governor and council, whose *receipt should discharge the debtor for so much.* In 1796, after the decision of the supreme court of the United States that those payments did not discharge the debtor from the demands of his creditor, the legislature passed an act authorising the persons who had thus paid money into the Loan office to receive a certificate from the treasurer for the amount according to the scale of depriciation *at the time the payments were severally made*, together with interest. It will not, perhaps, be contended that because the money was due from the state, the debt was not to be scaled, for that point was settled in the case of the *Commonwealth* and *Beaumarchais.* *(a)* But it will be insisted, that because it was paid under the faith of a law, the commonwealth is bound to release the debtor.

(a) 2 Call, 122.

I will not question the motives of the federal court, but have no hesitation in saying their decision was wrong. Virginia, being a sovereign state, had a right to pass the law in question; and a mere treaty, after the passage of the law, could not annul it. Although treaties are declared by the Federal constitution to be the supreme law of the land, yet they cannot have a retrospective operation, so as to annul the acts of sovereign states: nor has the judiciary of the United States any such power.

It may be said that the application of the scale was a hardship on those who owed British debts; but they cannot complain; because the principle established by the legislature is perfectly equitable as between individuals, and they are placed on the same footing as all other persons. Ours was not an ordinary situation. Young and inexperienced in the art of war, helpless in the means of carrying it on, and contending with one of the most powerful nations in the world, we were compelled to resort to every expedient authorised by the law of nations to annoy our enemy and promote the success of our cause. Large quantities of paper money, which has emphatically been called "the shield of America," were emitted. All classes of citizens suffered more or less by its rapid depreciation; and every individual had to make some sacrifices; but this, with other evils incident to a state of war, was only purchasing our liberties at a cheap rate. From the necessity of the case, this paper money was finally called in, at a great reduction from its nominal value; and a scale of depreciation

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established for the adjustment of debts contracted during its existence. This was effected by positive legislative acts, and, in many instances, operated as injuriously on individuals, as the reimbursement according to the scale, to those who owed British debts, would now do. If it is admitted that the legislature has power to pass laws, the debtors, in this case, can only claim in the manner in which they are authorised to be paid; that is, by the scale of depreciation.

The only question is, when ought the scale to be applied? The money was paid into the loan office in 1777 and 1778, but not transferred to the sequestration fund till 1779; and the act of 1796 expressly says that the money shall be repaid according to the scale at the time it was originally paid on account of the British creditor.

But it may be said that this is not a common case; and because the money was loaned in 1777 and 1778, the scale ought to be applied at that time, and not when it was paid on account of the British debt. When the loan office certificate was deposited in the sequestration fund, it ceased to exist; and the receipt of the governor and council was the only evidence that it was paid in discharge of such debt. The contract then, for the first time, originated with the government; and it would have been the same thing if money had then been paid. The case of the Commonwealth vs. Newton (*a*), decided a few days ago, is analogous to this. There the bonds were due by the state long anterior to the revolution; but Newton having taken out warrants for the interest, in 1778, in the form of loan office certificates; those warrants were subjected to the scale.

(*a*) Ante. pa. 90.

The decree is also erroneous in directing *warrants* to issue by the Auditor, and not *certificates* by the Treasurer.

Call, for the appellee. As to the principal point in the cause, I have not formed any very deliberate opinion. The petition of appeal from the decision of the Auditor stated that my client was entitled to the full sum paid into the treasury on account of the British debt, and it is my duty to contend for it.

The commonwealth entered into an agreement with her citizens, that for whatever amount they would make payments to her on account of their British creditors, she would *discharge* them. How could they be discharged, if they were afterwards liable to pay? On every principle of

contracts, it was the duty of the commonwealth to exonerate them; because she received a valuable consideration. It was no argument to say that the state might have enforced the payment into the loan office of those debts. She did not think proper to do so. If then she chose to become a contractor, instead of exercising her sovereignty, she was bound to perform her contracts.

It may be said that the citizens were not compelled to pay the amount of their British debts into the treasury; they were only invited to pay them: but, when it is considered that the object of the government was to prevent succors of any kind from going to the enemy, this invitation imposed a moral obligation on the citizens to comply with it. It was also the policy of the state to adopt this mode, because those indebted to the British might not otherwise have been known. This class of citizens ought not alone to fall sacrifices to the calamities of war. In many instances they have been ruined by making those payments, because that circumstance furnished evidence of the debts, which could not otherwise have been proved. Considering the engagement of the state as a contract of indemnity, she was bound to perform it in its full extent. In no instance has the scale been applied to such contracts. Mills vs. Bell, in this court (*a*), establishes this principle. I do not mean to contend that because it was a public debt, it was not to be scaled; but I rely on the case of the Commonwealth vs. Beaumarchais, cited by the Attorney Gen'l, to prove that claims against the commonwealth were to be decided on the same principles, as those between individuals; and, this being a covenant to indemnify, the scale could not be applied to it. There is also an additional reason. All other creditors of the state, who held loan office certificates, were permitted to exchange them for money. But those who became creditors by depositing their money in payment of British debts, were expressly prohibited from drawing it out again, (Ch. Rev. p. 82.) Thus they were deprived of the use of the money, and prevented from applying it to the payment of other debts.

(*a*) 3 Call, 320.

But it is said that those who made such deposits can only claim as they are authorised by particular laws. These laws are *ex post facto*; and, although there is no positive provision in our constitution declaring that they are not valid, yet this court has uniformly decided against them. Besides, it is not in the power of the public, by its own *ipse dixit*, to alter its contracts with individuals (*b*). The general law for scaling debts, applied to all persons;

(*b*) Grotius 330, Puffendorf, 865.

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but the act of 1796, is partial and violent in its operation, and made by one of the contracting parties only. Thus Philip II, king of Spain is said to have abolished all his debts, by his own act.

But, if I am mistaken on the main point, the Attorney General was equally mistaken on the other. The Chancellor fixed the scale, at the date of the payment into the treasury; which was surely right. In Pleasants vs. Bibb (*a*) the court decided that, where it appeared from the documents that the contract was of anterior date to the bond, the scale should be applied at the time of the contract. The governor's receipt, in this case, refers to the loan office certificate; and is like the case of Pleasants vs. Bibb, where the bond was to carry interest from a prior date. The governor had no power to receive the money: he could only give a receipt founded on those of the Treaurer in 1777 and 1778, which alone was evidence of the payment.

(*a*) 1 Wash. 4.

It is said that this point was settled in the case of the Commonwealth vs. Newton; and that the appellees are not entitled to a warrant, except under the act of 1796. I am of a different opinion, and consider that case as conclusive authority in our favor. Newton merely received his warrant for interest, without reserving a right to contend for further compensation, as in this case. *There*, too, although the act of assembly said he should receive his principal debt out of a particular fund, yet, that fund proving unproductive, the court said his interest should neither be extinguished, nor the debt considered as paid. So *here*, if Walker cannot obtain justice by receiving payment under the particular provisions of the act of 1796, the court will look into the original tansaction in order to effect it.

Randolph, in reply. With respect to the grand principle involved in this case, Walker's executor is not the only person interested. Hundreds of others are now waiting the event of this decision, and should it be in favor of the appellee, the whole revenues of the state for many years to come would not be sufficient to satisfy their claims. I know that this circumstance will have no weight with this court; nor was it intended that it should. Public inconvenience, however, ought always to be a great obstacle to granting any claim; and nothing but the injunctions of particular laws can justify the granting this, which will be attended with such extraordinary consequences.

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Not a law can be produced which gives the Auditor power to act upon this case. In 1777 and 1778, the money was paid into the treasury; and it could not be drawn out again until it was authorised by the act of 1796. By this law the scale was directed to be applied in a particular manner; and the officers of the government could only act under its positive laws.

But on the merits, the commonwealth was not bound to pay the *full* amount. Virginia, a sovereign state, and not even bound by the confederation, might well say to her citizens, "if you will pay to me the money due from you "to my enemies, I will protect you as long as my sove- "reignty continues." After this, a confederation of the states was formed, which being found inadequate, the people, (of whom the appellee's testator was one,) in their sovereign character, organized a new government, by which treaties were declared to be the supreme law of the land, and a judiciary was established, whose decisions, by virtue of a treaty subsequently made, annulled those payments. Can any thing be more unreasonable than the present claim? The sovereignty of the state would have been faithful to its contracts; but was prevented by an act to which the claimants were parties, which act took away that sovereignty.

If this case is considered on the ground of indemnity; Virginia is only answerable for damages. Where an individual undertakes to do a particular thing, and is prevented by a positive law, nothing more could surely be expected, than a retribution, according to the rate of the injury. What is the quantum of damage sustained by the appellee's testator? He paid money into the treasury in 1777 and 1778, far less valuable than specie. We are willing to pay the worth of this money, but not an *imaginary* value. The case of Mills vs. Bell, related to *land*, and is not within the reason of this case.

Grotius and Puffendorf have been quoted, as if this question was now before the legislature. This is not the first time that the President of this court has been addressed as if he was sitting in the speaker's chair, surrounded by the members of the general assembly.

Call. Mr. Randolph has mistaken the second point. The money was entirely paid in 1777 and 1778, for the British debt, and the certificate carried to the governor and council in 1779. With respect to the disability of the state. It is still lawful for the commonwealth to indemnify. Not so in the case of individuals.

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Randolph. The commonwealth said to her citizens, "by virtue of my *law*, your payments shall operate as a "discharge of your British debts." A superior law has said, Virginia shall not perform her contract in the manner in which she undertook.

Cur. adv. vult.

Thursday, Nov. 13th---The Judges* delivered their opinions.

* Judge TUCKER did not sit in this cause.

Judge ROANE. This is an appeal from a decree of the Chancery Court for the Richmond District, rendered in favor of the appellee, upon an appeal from a decision by the Auditor. The testator of the appellee had paid into the treasury certain sums of money in November, 1777 and April, 1778, on account of a British debt due by him, and delivered the certificates therefor to the governor, who, on the 25th of May, 1779, granted his receipt for the same. Subsequent to the act of 1796, upon the subject of such payments, the appellee applied for the said sums with interest, but the officers of the commonwealth insisted on reducing them by the scale as on the 25th of May, 1779, and not as on the days when the aforesaid sums were paid into the treasury. The Chancellor decreed for the appellee the sums produced by the application of the scale, as on the days last mentioned. The appellee now insists that the Chancellor ought moreover to have decreed him interest from the days aforesaid. He also insists that those sums ought not to be scaled at all, but be repaid to him at the nominal amount, alledging that he has been obliged to pay up in specie the whole of the British debt aforesaid, under a decision of the Supreme Court of the United States, on that subject.

This last question is extremely important, and, although not much pressed in the argument, must now receive the decision of the court. The act of 1777, ch. 9, under which those payments were made, strongly purports that such payments should operate a discharge of the British debts. At that time Virginia was completely sovereign, and, although she did not confiscate the British debts, she placed herself in the shoes of the creditor, and plighted the faith of the nation that the debtor should be thereby completely discharged. Nothing but the transfer of the sovereignty of Virginia into other hands, the extremity of state necessity, or the unparalleled circumstances and distresses of the revolutionary times, could justify that breach of the public faith, which gave rise to the present application. The situation of this state and of the

other states in the union was such, however, during the revolution as scarcely to find a parallel in the history and events of other nations. The necessity for emitting large sums of paper money, caused an enormous depreciation in its value, and the commonwealth was unable to make good its engagements to the holders of that currency, which stipulated a redemption thereof in Spanish milled dollars. In various other views also, the plighted faith of the nation was violated in relation to all descriptions of our citizens, and eventuated in results which nothing but the most imperious and invincible necessity can excuse or justify. Subsequent events, arising from our treaties with Britain and regulations in favor of British subjects have exhibited this remarkable spectacle, that such subjects have been completely sheltered from those calamities which, resulting from the abolition of paper money, overwhelmed and ruined many of our own citizens! Our political history has exhibited the rare phenomenon of a nation yielding greater attention to the interests of foreigners than of its own people, not only in relation to the British debts now in question, but in the institution of certain courts, principally with a view to the dispensation of justice, in cases wherein such foreigners are parties

During the paper money aera, payments actually made to creditors, operated a complete discharge of the nominal value; and the debtors to British subjects were only deprived of that advantage by the absence of the creditors. That circumstance, however, would have been remedied by the act of 1777, had not the policy of the nation been afterwards retraced by stipulating a re-payment of the British debts in specie. It must be confessed however, that the value of the paper money paid into the treasury was far below what its nominal amount purported. It must also be admitted, that those debtors have ever gained by such payments in cases where they were not themselves indebted to others, or were prevented by any causes from making payments to such other persons in depreciated paper. In these cases, the money would have continued to depreciate in their hands, and have caused to them a total loss. Considerations of this kind tended to alleviate the regret the commonwealth must feel at the unavoidable rejection of the enormous claims of persons similarly circumstanced with the present appellee.

The act of 1777 does not confiscate the British debts: it only sequesters them, and places the commonwealth in the situation of a receiver of the money due to

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British subjects. The act indeed declares that the payments into the treasury shall discharge the debtors for so much as should be paid in: but, considering that the act does not confiscate the debts, and that consequently none, perhaps but the creditors could give regular discharges for them; the act ought, I think, to be considered as a covenant of indemnity to the debtors. It ought to be considered as a stipulation on the part of the then sovereign commonwealth of Virginia, that neither by any law, nor any treaty formed with another power, should this payment be affected, nor the debt be considered (in relation to the debtor) otherwise than as completely discharged. But the sovereignty of Virginia, as then existing, has passed into other hands; first, into those of the government of the confederation, and lastly, into the hands of the present government of the United States. All the citizens of this commonwealth were parties, and assenting to that change; and the covenant above spoken of, (if it now exists at all,) is obligatory on the general government only, whose laws and treaties, and the decisions of whose courts, have violated the faith of the commonwealth of Virginia, plighted by the act of 1777, to the injury of the present appellee. Nothing is more clear than that a sovereignty succeeding to another, also succeeds to all its just engagements, and that a nation shall not be held to a strict performance of its contracts, after its power and character as such have passed away. The liability of nations to revolutions and changes of this kind is always contemplated in contracts or agreements with individuals or others; and the case before us is the stronger against the appellee in the present instance, in that the change now in question, was assented to by him in common with the other citizens of America. If, therefore, any redress exists for the appellee, touching the premises, it is to the government of the United States that he must apply, and not to the commonwealth of Virginia.

With respect to the question concerning the application of the scale in the case before us, I am of opinion that the Chancellor's construction upon the subject is correct. The act of 1777, considers the payment of the money into the loan office, as the payment on account of British debts, and the receipt of the governor has relation to such payment, and is an acquittance for so much as is paid by the debtor. I have examined a receipt by the governor in a case of this kind, which, 'though posterior in date to the certificate of the treasurer, recognizes the payment into

the treasury as of a preceding day, on account of a British debt. The agency of the governor is limited to the receiving and preserving the evidences of payment, and to granting receipts thereupon pursuant to the act of 1777. Nothing in the act of the 3rd of January, 1788, or in that of the 19th December, 1796, referring thereto, gives any new rule on the subject, or varies that construction which existed independently thereof. As the paper money was in a state of progressive and rapid depreciation, it is evident that the commonwealth has received more value in the case in question, than she would repay by applying the scale as on the 25th May, 1779; I am clearly of opinion that the same value (with interest) should be repaid, as was received by the commonwealth, which can only be by applying the scale at the respective dates when the monies in question were paid in. The sums produced by such application, with interest, (deducting the payment already made by the commonwealth) is what the appellee is entitled to receive, and, with this variation as to interest, I approve of the Chancellor's decree.

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Judges FLEMING, CARRINGTON and LYONS concurring, the following decree was entered....

Decree of the Chancellor reversed. And the Auditor directed to state and settle an account between Walker and the Commonwealth, crediting the payments made into the loan office by Walker for Farrel and Jones, according to the scales at the respective days of payment, with interest on each payment to the date of the payment made to his executor by the Treasurer, then charging such payment, and after deducting it, issue a warrant to the executor on the Treasurer for the balance then due, with interest from that date.

HUNNICUTT and others *against* CARSLEY.

THE appellee brought an action of covenant against the appellants in the District Court of Petersburg. The defendants pleaded, "not guilty;" upon which issue was joined. A verdict and judgment having been rendered for the plaintiff on this issue, an appeal was taken to this court.

A plea of *not guilty* to an action of *covenant* is cured by a *verdict*.

Judge TUCKER remarked the informality of the plea; but conceived it was too late to take advantage of it, after verdict. And, *by the whole court*, judgment affirmed.

Saturday, November 8,

BARING *against* REEDER.

In ſuits in which the husband is not immediately and certainly interested, but may be ſo eventually, the wife is a *competent* witneſs; but the jury are to judge of her credibility.

In *Trover* by B. against B. for goods which had been lent by B. to the wife of C. & conveyed by C. to R. the wife of C. is a competent witneſs.

THIS was a writ of supersedeas to a judgment of the District Court of Morgantown.

Several points were made by the counsel on both sides: but the judges, in delivering their opinions, having noticed one only, the state of the case and arguments of counsel will be confined to an elucidation of that point, viz: how far the wife is a competent witness in a case in which her husband may eventually be, but is not immediately, interested.

Sundry articles of personal property having been lent by Baring to the wife of Richard Claiborne, (which loan was proved by letters from Baring and his wife, who was Mrs. Claiborne's sister,) and Richard Claiborne being in possession; he made, on the 17th of December 1799, an absolute bill of sale to Reeder; compriſing in it, not only the greater part thereof, but several other articles to which Baring had no claim. This bill of sale was recorded in the county court of Monongalia, on the 14th of August 1800; but Claiborne still retained possession of the property.

Baring, having understood that Reeder, by virtue of the bill of sale, intended to take away from Claiborne the articles mentioned therein, on the 19th of August 1800 took into his own possession those which belonged to him. An action of Trover was thereupon brought against him by Reeder. On the trial of the cause, he offered to prove by the deposition of Mrs. Claiborne (which had been taken by consent, reserving the right of the plaintiff to except to her *competency*,) that several of the articles mentioned in the bill of sale and declaration were lent to her by him; that she had informed Reeder of this circumstance, and had shewn him, before he took the bill of sale, one of the letters which were eyidence of the loan; and that many of the articles for which the suit had been brought, being not the property of Baring, had never been claimed by him, nor taken into his possession:—to the reading of which deposition the plaintiff by his counsel objected, because "the said Anne Claiborne was interested, and an incompetent witness;"—which objection being sustained by the court, Baring filed a bill of exceptions. The jury found a verdict in favor of Reeder for $1148 34, damages. A motion for a new trial, on several grounds, stated in the record, (but unnecessary to be mentioned here,) having been made, the plaintiff in open court released all the damages, except $950; whereupon the motion was overruled, and judgment entered for the plaintiff.

Wickham, for the plaintiff in error, contended that the deposition of Mrs. Claiborne had been improperly rejected by the District Court. Even her husband would have been a competent witness, because he was liable to *Baring and Reeder* equally, and the verdict in this case would not have been conclusive against him (a). The rule, that no person shall be received to invalidate an instrument given or attested by himself applies only to *negotiable* instruments (b). *Claiborne* might therefore be permitted to prove that altho' he had executed the bill of sale to *Reeder*, it included the property of *Baring*. If the objection be personal to *Claiborne* on the ground that such conduct was destructive to his credit, the same objection would not apply to his wife. The doctrine that the wife shall not be permitted to accuse the husband of a crime, is to be understood in a *technical*, not a *moral* sense.

(a) Peake's L. Ev 102: 2 Call 231, Meade vs. Tate: 1 Strs. 35. 1 Term Rep. 164: See also Peake's L. Ev. 93.

(b) Peake's L. Ev. 128.

An *interest* in a witness to exclude him from giving testimony, must be direct and certain, not in expectation merely (c). In this case, Claiborne and wife had not such an interest as was known to the law, but depended upon the benevolence of Baring. If Claiborne had objected to answer interrogatories because he would thereby subject himself to an action; still his wife might have been received as a witness; and her declarations could not be given in evidence to charge her husband (d). Although the wife cannot give evidence tending to criminate her husband, yet between third persons, she may be called to prove facts which may eventually charge him (e).

(c) Peake's L. Ev. 93 to 95.

(d) 1 Strs. 504. Williams vs. Johnson.

(e) P. Ev. 128.

Attorney-general and Randolph, for the defendant in error, insisted that Mrs. Claiborne was not a competent witness. The law, which prevents husband or wife from being witnesses for or against each other, is founded on general principles, and is intended to avoid that discord in families, which would inevitably ensue from a contrary rule (f). In this case, Mrs. *Claiborne* was introduced to prove facts which would shew that her husband was guilty of a fraud; and, moreover, such as might produce a verdict which would be the ground of an action against him.

(f) 2 Bac. abr. Gwil. ed 578: 1 Bl. Com. 442: 3 Wooddeson 288.

Suppose a writ of *fieri facias* had been levied on the goods, would she, in an action against the sheriff, be a competent witness to prove the right of property? The case of *Williams* vs *Johnson* (g) was a mere *nisi prius* decision, and not settled on any correct principles; nor has it any application to the present question; because the verdict in that case could not have been given in evidence against the husband.

(g) 1 Strs. 504.

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In *Davis* vs *Dinwoody (h)* the above case seems to have been overruled; and in *cases Temp. Hardw.* 264, 2 Ec. Ca. Abr. 215, the true ground of objection to the husband's or wife's giving evidence for or against each other, is stated to be, that the peace of families might otherwise be destroyed.—This reason operates as strongly where the interest is eventual, as where the husband is a party. The above principle is also recognised in the case of the *King* vs *Cliviger*, *(i)* in which it was said, that the wife could not be permitted to give evidence even *tending in any degree* to criminate her husband.

(b) 4 Term. Rep. 678.

(i) 2 Term. Rep. 265.

Wickham in reply. All the objections to the admissibility of Mrs. *Claiborne's* testimony go to her *credibility* and not to her *competency*. In *Lowe* vs. *Jolliffe (a)* a witness to a will was admitted to prove the insanity of the testator, although his subscribing his name as a witness under such circumstances went much to his credit. *Lockhart* vs. *Graham (b)* is a very strong case to shew that the witness must have a certain interest. These, with the cases before cited, he considered as conclusive. The case of *Williams* vs. *Johnson* is objected to, because it was a decision at *nisi prius*: but it must be recollected that all questions on evidence arise there. It is, however, cited as authority in all modern publications of merit *(c)*. But it is asked, suppose a writ of *fieri facias* had been levied on the goods, would Mrs. Claiborne have been a competent witness to prove the right of property? The answer is, that she certainly would. Why should she not? The effect would be more immediate in that case; and consequently there is less weight in the objection to her competency in the present; but no reason can be given for her exclusion in either case.

(a) 1 Blac. Rep. 365.

(b) 1 Str. 25

(c) See Ps. L. Ev. note (q) 123 126, Supp. to Vin. A. 203.

The case of *Barker* vs. *Dixie* cited from *Cases Temp Hardw.* 264. does not apply: there the husband was a party. The decision of the court, in the *King* vs. *Cliviger (d)* was right upon the main question; but some loose *dicta* of the judges have been quoted, which were not warranted by the case before them: and even the authority of that case has since been doubted *(e)*. The husband was properly rejected as a witness, in the case of *Davis* vs. *Dinwoody (f)* because the suit, though in the name of the wife's trustees, was, in effect, for her benefit. *Claiborne* not being a *party*, in the case before the court, his wife was surely a *competent* witness, and ought to have been received to prove the facts for which her testimony was offered.

(d) 2 Term. Rep. 265.

(e) See Christians note to 1 T. Black. 443.

(f) 4 Term. Rep. 678.

Cur. adv. vult.

Wednesday, Nov. 19th, the judges delivered their opinions. NOVEMBER, 1806.

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Judge TUCKER. The only question which appears to me to deserve a moment's consideration in this case is, whether the court erred in rejecting the testimony of Mrs. Claiborne as an incompetent witness.

Had the question been made as to examining her *viva voce* before the nature and amount of her testimony could be known, I should have felt some difficulty; from which I feel myself relieved by seeing the sum and substance of what she deposes. It is impossible to read it without feeling, that, although as a married woman she could not be said to have a *legal interest* in the goods in controversy, yet she derived such a *benefit* from the *possession* and *use* of them as might be deemed *equal* to any benefit she could have had of them, as the goods of her *husband*. The object of her testimony was to *continue* and *retain* that benefit to herself. The whole tenor of her testimony goes to prove that the defendant asserted a claim to the goods, *purely for her benefit;* for he never claimed or thought of claiming them till they were to be taken *from her*, and *her* evidence is to prevent their being taken from herself. Where the temptation to perjury is manifestly great, if the witness be sworn; or if the circumstances of the case be such that although the witness should be sworn she cannot be entitled to credit, ought a court to admit the witness to be sworn? Upon what other ground is it that the incompetency of parties, and of husband and wife in cases affecting each other is founded? "It has always been held "a sacred and inviolable rule of evidence, in all cases whatsoever not to admit the testimony of a witness who is either to be a *gainer* or *loser* by the event of the cause, whether such advantage be direct and immediate or consequential only," (2. Ba. abr. 584.) Though Mrs. Claiborne could not in a technical sense be legally a *gainer* or *loser* by the event of the cause (being a married woman who can acquire no property of her own) there can be no doubt that in a moral light, she was as much affected by it, as if she had been a *feme sole*. A tenant in *possesion* is not an *admissible* witness to prove the estate of his landlord for this would be to uphold his own possession. Cowp. 621. The reason in this case is precisely the same. Mrs. Claiborne's testimony goes to support her own *possession*, *use* and *convenience*, derived from these goods intended peculiarly for *her benefit*.—*See also* 2 *Term. Rep.* 63.

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Upon the ground of public policy and convenience I am also of opinion that her testimony was properly rejected. Had a creditor levied an execution upon these goods in the possession of Claiborne, and in the daily use of his family, would a court be justified in admitting his wife to prove that the goods were not *his* but belonged to a stranger? If such a practice were once admitted, an execution by *fieri facias* might always be evaded, and the process itself reduced to a mere nullity, by calling upon the wife of the defendant to prove, that though taken in his possession, and though used as his own for any period less than five years, they were in fact the property of a stranger. Collusive claims, for the purpose of protecting the property of debtors from execution might be so easily set up, that if such evidence as Mrs. Claiborne's in this case be admitted to support them, no man could ever recover a debt, by levying an execution upon any species of personal goods. The case of Davis vs. Dinwoody, 4. T. R. 678 which I cite, not as a PRECEDENT (for no decision in England since our independence commenced, has any authority in this court) but merely as an *apposite* case decided by able judges upon the same law which as to this point prevails in this country,—was one of that kind. An execution was levied on goods in *possession of the husband*, and upon an action against the sheriff by an executrix of the surviving trustee of the wife, the husband was called upon to prove the identity of the goods contained in the schedule; and held that he was incompetent. I am therefore of opinion that the judgment of the District Court ought to be affirmed.

Judge ROANE. This is a supersedeas to a judgment of the District Court of Monongalia, in an action of *Trover*, brought by the appellee against the appellant. In that action, in which the writ was issued and served on the same day, viz: the 19th of April 1800, the appellee declared for a great variety of goods and chattels which are particularly specified. On the plea of *not guilty*, a verdict was found for the plaintiff, for $1148 34 cents damages. A motion was made by the defendant for a new trial; but on the plaintiff's releasing all the damages, except $950, the motion was overruled, and judgment rendered for the balance.

Several grounds were assigned by the appellant in support of the motion, as appears by the bill of exceptions: but my opinion will principally turn upon the question of the competency of Mrs. Claiborne as a witness, whose deposition is set out therein; the other topics will, therefore, be

but slightly and incidentally touched. As that deposition goes to shew, that some of the goods in question were the property of the appellant *Baring*, and that her husband *Richard Claiborne*, under whom the appellee claimed them, had no right thereto, it is evident that *Baring* may have been injured by the rejection of her testimony, if, in point of law, Mrs. Claiborne were a competent witness.

The bill of exceptions, which was tendered by the appellant, states, that at the trial the appellee exhibited to the jury a bill of sale of *the 17th of December* 1799 from Claiborne to him (the appellee,) which comprehends, perhaps, all the articles stated in the declaration, (with a few others) with an endorsement made thereon that it was proved and ordered to be recorded in Monongalia court, on the *14th of August*, 1800; and that the appellee being ready to prove the execution thereof by the subscribing witnesses, the appellant agreed to admit the same *as evidence* in the cause. It is not stated by the appellant, that the bill of exceptions contains the *whole* evidence exhibited on the part of the appellee at the trial; that the appellee gave *no evidence* of the delivery to him of the goods by Claiborne, at that, or any posterior time; nor is any thing stated by the appellant which is inconsistent with such an idea. It *may be*, therefore, for any thing known to us, with certainty, that the sale of the goods was consummated by a delivery thereof to the appellee by Claiborne, and that they were afterwards redelivered by him to Claiborne, to be holden by curtesy merely. Unless therefore we supply the defective statement of the appellant, in this particular; unless we take it for granted that the appellee proved *nothing* but what his adversary was pleased to state he did prove; unless we take it as a general rule that every thing proved at a trial is always inserted in the bill of exceptions; unless it be necessary for the party prevailing, and who takes no exception to the opinion of the court, to shew in the bill of his adversary, that the court has done right, rather than for his adversary to shew therein that the court has erred, the great question argued at the bar under our act of frauds, which *presupposed* a non delivery of possession by Claiborne to the appellee, does not occur.

The bill of exceptions then goes on to state various testimony, proper for the consideration of the jury, on the point of conversion by the appellant, *at* and *before* the time of the service of the writ in question. At present I shall only say, on this point, that this evidence, in connexion with the evidence of *title* arising under the bill of sale to the appellee,

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imposed it on the appellant to exhibit opposing testimony. Such testimony, as to the conversion, has been exhibited by him, of witnesses who are not objected to: but the testimony of Mrs. Claiborne (the wife of Richard Claiborne) was also offered and *rejected*, whose evidence goes as well to the point of conversion, as of title to *some* of the goods, in favour of the appellant: and this brings us to the question of her competency as a witness.

With respect to the reading of her deposition, an objection has been taken, that it is not shewn to have been other than a *de bene esse deposition*; and that if it were a de bene esse deposition, the measures preliminary to its introduction are not shewn to have duly taken place. I shall not stop to enquire from the terms of the caption of that deposition, or otherwise, whether it were agreed to be an absolute deposition or not: but this I say, as in the former case, that I will presume that the appellant shewed that which was necessary to its consideration by the court, as his adversary has not shewn the contrary; and I will also presume, 'till the contrary appears, that the judge who presided at the trial, did not enter into the merits of the testimony, until by a compliance with the necessary pre-requisites, the party offering it had entitled him to do so.

The testimony of Mrs. Claiborne, as spread upon the record, goes to shew that *part* of the articles in question were the property of the appellant; that they were placed in her hands *as a loan*, and not as a gift; that she never did consider them as the property of Mr. Claiborne; and that the appellee was apprized of the appellant's claim of property therein, prior to the date of his bill of sale: it also goes to the question of *conversion* on the part of the appellant, as *at* and *before* the date of the writ; and however the *whole* testimony in the cause may stand, with respect to such conversion, as at that time, (as to which the jury were the proper judges, and I think, have decided rightly) Mrs. Claiborne herself, (as well as other testimony,) admits that the appellant had re-possessed himself of his own goods at least, at and *before* the time of taking her deposition. In this reinvestiture of that property by the appellant, Mrs. Claiborne and her husband acquiesced, and it does not appear that, thereafter, any new contract was entered into in relation thereto, or that any new delivery thereof by way of loan or otherwise, was made to Mrs. C. or her husband.

As preliminary to the discussion relative to Mrs. Claiborne's competency, I will take a bolder ground and en-

quire whether her husband himself would not have been a competent witness: I sav a bolder ground, because while her interest is emphatically his interest, perhaps the doctrine of estoppels, in relation to the deed from Claiborne to the appellee, would apply less strongly to her than to him, if indeed it would apply to him at all, in the case before us. The maxim from the civil law, so often quoted in cases of this sort, "*nemo allegans suam turpitudinem est audiendus*" certainly cannot apply to her, otherwise than by that fiction and inference of law, which (as to many purposes,) considers husband und wife as one person.

There is no subject or doctrine of our law which is less technical, which is more a system of right reason, depending upon just inference and deduction by enlightened minds from plain and self evident principles, than the doctrine of EVIDENCE. The leading principles on this subject are few, and *abstractly taken*, must be assented to by all: but great confusion has arisen in the reports upon this subject, by the infinite variety of aspects in which cases of evidence present themselves; and by the circumstance of those cases occurring, principally, in trials at *nisi prius*, and the consequent want of time and leisure in the judges to test the cases, under all their circumstances, by fixed and self-evident principles. It will be seen in the case of *Abrahams* vs. *Bunn*, (4 Burr, 2261,) that from this mere circumstance, the court of king's bench in England were obliged to decide as *res nova*, upon great consideration, a question which had a thousand times *occurred* at *nisi prius*, but which had from the above causes never heen correctly understood. When we add to this, that in modern times, cases on the very question before us have been often and solemnly decided by the courts of *Westminster-Hall* in that country, upon *argument and great deliberation*, we must hot only give the preference to the modern decisions on this subject, but also unavoidably approve the manly and independent declaration of Lord Mansfield, in the case of *Lowe* vs. *Jolliffe* (1 Black. Rep. 366,) who, in the name of the court said, "we do not sit here to take our rules of evidence from Keeble or Siderfin."

As I am upon the subject of the modern decisions in England, I will beg leave to say, that while I consider myself bound to *pare down* the governmental part of the common law of England to the standard of our free republican constitution; while I am free to admit, that from the *progressive* and *mutable* state of the common law (even the law of *meum et tuum*,) on *some subjects*, that law ought not to

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be received here, whether evidenced by new or old decisions, in the same *extent* that it is admitted in England, the circumstances and character of which nation varying from our's, produces, (imperceptibly perhaps) a correspondent variation in the rules of their common law; (such for example as those which depend upon and vary with the highly commercial character of the nation;) yet that on such rules of the common law as do not change, such as are neither affected by a change in the form of government, nor by a variation in the circumstances or character of the nation, I am free to avail myself of the testimony of able judges and lawyers of that country, even of modern times. As upon those subjects of *commercial* law or the law merchant, which are common to England and the other countries of Europe, the greatest judges who ever sat in England have often consulted eminent jurists and merchants on the continent, in relation to such law; as upon the subject of the law of nature and nations, we avail ourselves of the testimony of eminent writers, on those subjects, though clothed with no authority whatsoever; so with respect to this last mentioned portion of the common law, which *is* and must ever *be* the same in *both* countries, until altered by the legislature of either, I do not see that we may not avail ourselves of the testimony of the eminent and able judiciary of England, in relation to the subject. I shall certainly not be accused of partiality towards the *government* of Great Britain; but I wish not, without necessity, to sound the tocsin against that nation; to indulge my prejudices against her, to an unreasonable length; nor to shut out from our eyes that light, which, while it conduces to truth, will certainly not contaminate our political institutions. I am not willing that an appeal to my *pride*, as a citizen of *independent* America, should prevail over the best convictions of my understanding. I do not see why, upon principles of stable and unvarying law, such as those of evidence, for example, the epoch of our independence should be *clutched* with so much avidity: nor that, in relation to *such principles*, the testimony of Lord Mansfield delivered in 1777, is not of equal weight with his testimony delivered in 1775. I wish it however to be clearly understood, that I would not only confine the reception of the modern decisions in England to doctrines of *this description*, but would not receive even them, as *binding* authority. I would receive them merely as affording evidence of the opinions of eminent Judges as to the doctrines in question, who have at least as great opportunities to form correct opinions as we have, and are influenced by no motives but such as are common to ourselves:

and with respect to the *ancient* decisions in England, what judge would wish to go further? Who will contend that they are *binding authorities* upon us, in all cases whatsoever? Shall we not have the privilege every day exercised in England of detecting the errors of former times? Shall we "take our law of evidence from Keeble and Siderfin?" Shall we go back to the gothic days of Lord Coke, and reject every man as a witness who is not a Christian? If we are to draw a line of exclusion on a subject no way affected by the change of our government, (I speak now in relation to the law of *meum et tuum*,) why shall we not rather keep our eye upon the particular topics in question, and vary our rule accordingly, than upon the *time* of our separation which has no necessary connexion at all with the subject? It would be infinitely more mischievous for us to receive *en masse* all the doctrines of the common law as *our law*, and the ante-revolutionary reports thereto relating, than to select what is really our law, and even to read the modern decisions upon the subject thereof. Exclusively of the circumstance of our having become a separate and *independent* nation, every argument, which applies against the reception of the modern authorities in England arising from the annihilation of the right of appeal from our courts to the supreme court in that country, equally applied, before the revolution, to the decisions of the subordinate courts in *Westminster-Hall*, which were not paramount to our courts, and whose decisions were yet received. Whensoever the judiciary of this country shall have had time to rear up a system for itself: whensoever that judiciary or the legislature of our country, shall deem it proper to draw a *further* line of exclusion upon this subject, I shall most readily yield my concurrence: but certain I am, that inasmuch as from the very outset of our independence up to this day, this court, and perhaps every other court in the union, has been in the habit of inspecting and acting upon the modern decisions in England, under the restriction I have mentioned; and as those decisions have become the basis of their judgments, great inconvenience and mischief would result from making a *sudden alteration* in this particular; thereby shaking the authority of our own solemn decisions, and re-establishing the authority of such ancient decisions in England, as the modern ones, in both countries, had detected of error and exploded.

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I have deemed it proper to make these preliminary observations, because an objection is taken to the modern decisions, by the judge who has just spoken, it being impossible even to *question* the competency of the witness, on any

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other ground; and because I shall in this cause, as usual, and as *heretofore has been the course in this court*, quote and rely upon some post-revolutionary decisions in England, touching the subject before us: at the same time I do by no means admit, that the decisions of an earlier date would not equally support my opinion.

I come now to a particulaar examination of the question whether *Richard Claiborne*, the husband, would not himself have been a *competent* witness in this cause.

It is an established principle, that all persons are competent witnesses, who have either *no interest* in the *cause*, or whose interest therein hangs *equal* between the parties.—On this latter principle our act of Wills has proceeded, which in the event that a subscribing witness to a will has a *greater* legacy given him therein, than he would have been entitled to as his distributive share, only makes void that legacy, in so far as it exceeds that share. On this principle, that an interest on one side is counteracted by an equal interest on the other, it is held, that the acceptor of a bill of exchange is a competent witness in an action against the drawer, to prove that he had no effects, and thereby prevent the necessity of notice to him; for though by supporting the action against the drawer, he relieves himself from an action at the suit of the holder, he at the same time *gives an action* against himself, at the suit of the drawer, in which the want of consideration will not avail him, but must be proved by another witness. *Peake's L. Ev.* 154, *(2d edit.)* On this ground it was held, in the case of *Ilderton* vs *Atkinson*, (4 Term. Rep. 480,) that if A have received money from B to pay to C, and the question be whether A were the agent of C, he (A) may be called as a witness to prove the agency; as in any event he stood indifferent between the parties being either liable to *pay* the money to the plaintiff, or *refund* it to the defendant.

In the case before us, *R. Claiborne* stood entirely indifferent between the parties. By giving testimony and procuring a judgment for Baring in this action, he subjected himself to the action of Reeder founded on the warrantry in his bill of sale: by procuring a verdict and judgment for Reeder, he laid himself liable to Baring's action, to recover the value of HIS goods sold to Reeder.

But however Claiborne might be interested in the *question* contested between the parties in this suit, he is a *competent* witness, if he is not interested in the event of this *cause*; or, if being interested on one side, he is equally interested on the other. This position is entirely sustained by *many* modern cases, and particularly by the case of *Bent* vs *Baker*,

(3 Term. Rep. 27); and the rule now seems to be, that the witness is *competent* if the proceedings in the cause cannot be used as evidence for him, although he may entertain *wishes* on the subject, and even have occasion to contest the same question, in his own case, in a *future* action; and judge Buller says, he "takes the true line to be, is the wit-"ness to gain or lose by the event of the cause? which "cannot be, because the verdict in the cause in question "could not be evidence either for or against him in another "action." Under this principle it was held, in that case, that a broker who *himself* underwrote a policy, after having got it underwritten by another, is a competent witness in an action against that other to prove circumstances tending to shew that the underwriters on the policy were not liable to pay the loss; or, in other words, to vacate the policy as to that defendant: he was admitted to be examined, although clearly interested in the *question* contested, because he was not interested in the *cause*, nor could the verdict and judgment rendered therein, be given in evidence for or against him, in an action thereafter to be brought against him, on the same policy, and involving the same question. As to the old notion adopted by Lord Holt, in *King* vs *Whiting*, that the verdict in the first action would be sure to be *heard of* by the jury in the second, and influence their verdict, it has been long and often exploded. (See *Smith* vs *Prager* 7 *Term. Rep.* 63.) I apprehend that the principle of the above position is entirely borne out by the ante-revolutionary case of *Abrahams* vs *Bunn*, 4 *Burr.* 2251, supported and explained in the case of *Smith* vs *Prager* just mentioned; in both which cases, and especially the latter, it was held, that in an action for usury the party borrowing was a competent witness to prove the whole case.

It is an invariable rule of evidence, that as no man is permitted to give evidence in his own cause, neither shall he avail himself in a future action of a verdict founded on his own evidence. It is also a rule, that no man can be prejudiced by a verdict who could not have been benefited by it, had it gone contrary. (*Gilb. L. Ev.* 28. *7th edit.*) These rules, to say nothing of the necessity of the verdict's being between the *same* parties, go incontestibly to shew, that the verdict in the cause in question, could never be used for or against R. Claiborne in a future action.

But it is urged that this witness is *estopped* by his own deed, and cannot invalidate it. To this I will first answer, that if Claiborne had been offered and received as a witness, it does not necessarily follow, that he would have impeached his own deed. His testimony might have gone, for any

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thing appearing in the bill of exceptions to the contrary, to prove, on behalf of Reeder, that a delivery of possession accompanied his deed to Reeder; and, on behalf of Baring, that he derived a title under Reeder to the goods in question, posterior to, and independent of any question relative to the validity of, the bill of sale. In either point of view, the parties respectively would have been entitled to call him as a witness, and it might not be necessary, for any thing appearing in the bill of exceptions, for him to question or invalidate his own deed. But I will not put this question on this ground. I will meet the objection in its full force.

If Claiborne should even impeach his own deed in his *own cause*, it does not necessarily follow that he would *alledge his own turpitude*. Fraud, distress, duress, and various other circumstances, might have wrested it from him, might entirely have disrobed the transaction of all turpitude; and it may be, that the deed ought not to be a moment countenanced in a court of justice. But as no man commits iniquity or accuses himself of dishonorable conduct, without a motive, if he were to impeach the deed, merely in behalf of *others*, and to prevent injury and injustice to *them*, without a possibility of gain to himself, the disinterestedness of his motive would yield an apology for the *prima facie* turpitude of his conduct. But on this occasion we are not driven to general reasoning: abundant authorities occur to repel the objection.

In *Jordaine*, vs *Lashbrook*, (7 T. Rep. 604), we are told by Lord Kenyon "that estoppels are odious and ought not "to be extended further than the law has already carried "them." At *this time* the law had already admitted the *subscribing witnesses* to a will to give evidence to impeach it, (Lowe *vs* Jolliffe); at this time, in the case already mentioned of *Bent* vs *Baker*, an underwriter had been permitted to impeach a policy subscribed and effected by himself; and, in the principal case, (*Jordaine* vs. *Lashbrook*,) the payee and *indorsee* of a bill of exchange was admitted to prove that the bill was void in it's creation. It was not without some struggle that this last decision was acceded to, in respect of the negotiablity of the instrument. The rule, as generally understood before, arising out of the liberality of the modern decisions, had principally confined the doctrine of estoppels to *negotiable* instruments; but yet the decision in *Jordaine* vs *Lashbrook*, under all the aspects of the case, was carried:—But if this doctrine, as to deeds *generally*, had long before been relaxed; if that doctrine has also been relaxed in relation to the highly commercial instruments, policies of insurance, and the highly commer-

cial and negotiable instruments, bills of exchange, in the cases just mentioned, can we hesitate a moment to relax it in relation to the bill of sale in question?

R. Claiborne then had clearly no interest in the *cause* in question, as relative to the *property* in the goods, which would disqualify him from being received as a witness. Had he any interest in that cause arising from his right to *use* or *possess* them, which would work this effect?

An interest which disqualifies a witness from being received in a court of justice is, "where there is a *certain benefit* or *disadvantage* to the witness attending the consequence of the cause one way." *Gilb. L. Ev.* 106. A mere hope of benefit will not disqualify. Thus a woman whose husband was under sentence of death is a *competent* witness against others indicted for the same offence, though she confessed she had *hopes* that their convictions would obtain her husband's pardon. But if a man *promise* the witness, that if he recover the lands in question, he shall have a lease of them *for so many years*, this shall disqualify the witness, for he would have a fixed and certain advantage, by the event of the suit, and by his attestation derives a benefit to himself. *Gib. L. Ev.* 108.

The interest too must be of some *consideration or dignity* in the law: for it is held that a tenant at will of lands may prove livery of seizin in the lessor; for a man can't be said to *gain or lose* where he has only a precarious interest, and not such a certain benefit or charge out of the estate as he may recover in an action. *Ibid.* 108. I see no difference between this case and a *mere possession* of personal goods, on loan, which the owner may, at any time, put an end to, by recaption, if he can do it *without force*, or by suit where the possession is withheld from him without right.

But, in the case before us, there is abundant testimony, (even of Mrs. Claiborne herself) to shew that Baring had *repossessed* himself of the goods, and no evidence that he had made any new loan thereof of them to her or her husband. At any rate however, it is unequivocally proved, that Baring locked them up in the Smoke-house, and kept the key in his pocket: and in 1 *Bac.* 368, it is held, that if A leaves a chest locked with B and takes away the key, the goods are in the possession of *A*, for they are locked out of the possession of B, and that if B pawns them to a broker, *A* may recover them without tendering the money.

Whatever hopes or expectations, therefore, Mr. Claiborne or his wife may have had of *favor* from Mr. Baring in the event of his retaining the goods claimed by the appellee; whatever bias they may have had towards him from that or

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any other circumstance, I cannot see that he (or his wife) had such *certain interest* in the subject in question, as would disqualify them from giving testimony: at the same time it is admitted, that these circumstances might properly be addressed to the jury in estimating *his* credibility. If we once go beyond the line established as above, in relation to the reception of testimony; if we once go into the field of *bias*, of *wishes*, of *hopes*, or *expectations* of benefit, we have then lost sight of all of our land marks; we are at sea without compass to steer by, or rudder to guide our course;—the *relations* and *connexions* of parties litigant are to be excluded forever; and the whole fabric of the law on the point in question will be entirely demolished.

I have thus considered this case as if the question related to Mr. *Claiborne* the husband. This view is, in many points, much stronger than the case actually before us; and every thing I have said in favour of his competency emphatically applies in favour of that of his wife. If a man may, in behalf of a stranger, give testimony in a cause which involves a question concerning which he may in future be himself deeply interested in *another* cause, in which he is to be a *party*, and in which *other* testimony must be resorted to, to benefit him, this holds a *fortiori* (or at least with equal strength,) in relation to his wife. On this ground I entirely approve of the decision in *Williams* vs. *Johnson* (1 Stra. 504.) which was quoted in the argument. That case is also recognized as law, in many books and cases of high authority. In that case, the testimony of the wife went *not* (either directly or circuitously) to fix any *burthen* on her husband for neither her testimony, nor the verdict founded thereon could ever have been given in evidence against him: it merely went to exempt a *stranger*, to whom she was entirely indifferent, from being charged with a debt which was due to the plaintiff by another. And I take the rule on this subject to be, that in *civil* actions where the husband is *no party*, the wife may be called as a witness, even to facts, which, if proved in *another* action to which her husband is a *party*, and by evidence other than her own, may go to charge him. The unavailing testimony of the wife in such case, entirely impotent as it relates to the husband, producing to him no loss, and consequently exciting in him no displeasure, will not violate the reason of that policy, which, in respect to the harmony to be desired in the marriage state, has given rise to the rule in question.

In every point of view, therefore, I am of opinion that Mrs. Claibore was a competent witness, and that a new trial ought to be granted.

Judge FLEMING. The counsel for the appellant, in this cause in the court below, have stated five different grounds on which they moved the court below for a new trial. 1st. Because the verdict was against evidence. 2d. Because the damages were excessive. 3d. Because the evidence of Mrs. Ann Claiborne ought to have been admitted. 4th. Because the defendant, on the said trial was surprised by the rejection of the said evidence. 5th. Because since the trial they have discovered new evidence. As some of them appear frivolous and unfounded; and the force of others seems weakened by the offer of the plaintiff to release 198 dollars of the damages, I shall confine my observations to the rejection of Mrs. Claiborne's testimony, which to me, seems to be an important point, and is attended with difficulty; in the discussion of which it may not be improper to enquire what are the legal disabilities of a feme covert (as such) to give evidence in a civil cause? There are only two which occur to me at present; the first is where the husband is a party, either plaintiff or defendant in a cause; the other where the husband is immediately interested in the event of a suit.

It is a general principle that no one can be a witness for himself; and it follows of course, that the husband and wife, whose interest, the law has united, are incompetent to give evidence in behalf of each other, or any other person whose interests are the same; and the law, for reasons of policy, also prevents them from giving evidence against each other; for it would be hard that the wife, who could not be a witness for her husband should be a witness against him; but it has been adjudged that in civil causes, where neither is a party, the wife may be called as a witness to prove facts which may eventually, charge the husband; as in the case of Williams vs. Johnson, in 1 Strange 504; which case has never been over-ruled that I can discover. The case of Barker vs. Dixie, in the time of Lord Hardwick, and cited by Mr. Nicholas to prove a contrary doctrine, doth not apply; for there the husband was a party to the suit.

I shall next consider, on general principles, what is such an interest in the event of a suit as will totally exclude the testimony of a witness. And this has often been the subject of controversy. Lord Mansfield, when delivering his opinion in the case of Walton and others, assignees of Sutton vs. Shelly, 1st Durnford and East, 300, observed, that the old cases, upon the competency of witnesses, have

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gone upon very subtle grounds; but, of late years, the courts have endeavored, as far as possible, consistently with those authorities, to let the objection go to the credit, rather than to the competency of a witness. And Lord Kenyon when giving his opinion in the case of Bent vs. Baker, 3 T. R. 27, premised, with mentioning what was said by Lord Mansfield on the subject, and added, "if "the opinion of so great a judge stood in need of any sup- "port, it would have it from the sentiments of Lord "Hardwick, in the case of King vs. Bray, who said, that "whenever a question of this sort arose, on which a doubt "might be raised, he was always inclined to restrain it to "the credit rather than to the competency of the witness, "making such observations to the jury as the nature of "the case should require." Lord Kenyon further said, that, fortified with such authorities as these, he had no scruple in declaring his concurrence that, wherever there are not any positive rules of law against it, it is better to receive the evidence of the witness, making nevertheless such observations on the credit of the party as his situation requires. And Peake, in his treatise on evidence, page 144, adds, that the "general rule now established "is, that no objection can be made to a witness, on this "ground, unless he be directly interested, that is, unless "he may be immediately benefited or injured by the e- "vent of the suit; or unless the verdict, to be obtained by "his evidence, or given against it, will be evidence for or "against him in another action in which he may after- "wards be a party. Any smaller degree of interest, as "the possibility that he may be liable to an action in a cer- "tain event, or that, standing in a similar situation with "the party, by whom he is called, the decision in that "case may, by possibility, influence the minds of the jury, "in his own, or the like, though it furnishes a strong ar- "gument against his credibility does not destroy his com- "petency."

Let us apply these rules to the case now before us. It has been admitted that, should Mrs. Claiborne's evidence be admitted, it discloses facts that may eventually charge her husband. Admitting it to be so, we have the authority of the case of Williams vs. Johnson, directly in point, in support of the admission of her testimony. But the great objection made in the argument of the cause was the supposed interest she herself had in the event of it; from an expectation that, in case Baring should be successful, she would be favored with a reloan of the

goods. This seems to be a remote interest indeed, and only conjectural; but, however, that may be, and whatever may be the ground of such expectation, it cannot be affected by the event of the suit; for it is well known, that in an action of trover, the moment the plaintiff recovers his damages, for the conversion of the goods, the absolute property in them vests in the defendant, and a recovery of damages by Reeder can be no bar to Baring's exercising his benevolence to Mrs. Claiborne, should he be so inclined.

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As to the opinion that the admission of Mrs. Claiborne's testimony would be opening a door to fraud, and to perjury; and the apprehension that it might be considered as a precedent to sanction the interference of a wife, where a *fieri facias* is levied on the goods of the husband, I confess I have no such fears, as the cases appear to me to be very distinct from each other.

I am of opinion, upon the whole, that Mrs. Claiborne is a competent witness, and that the credibility of her testimony ought to be left to the consideration of a jury; that the judgment be reversed, the cause remanded to the court below, for a new trial to be had therein, with an instruction agreeable to this opinion.

Judge CARRINGTON. As I concur in opinion with the two Judges who have immediately preceded me, I shall be the more concise in assigning the reasons which have induced me to form that opinion.

The objection to Mrs. Claiborne's testimony is, that she was interested in the event of the cause, inasmuch as she would be deprived of the use of those goods, in case of a recovery by Reeder. The witness was in possession, and had the *use* of those things, at the will of Baring. If this had been an action of *detinue*, the *specific articles* might have been recovered, and Baring himself would have had no power over them; consequently Mrs. Claiborne would have been deprived of the *use*. But this is an action of *trover* to recover the *value* of the goods, which will neither disturb the possession of Baring nor the *use* to Mrs. Claiborne; and if Baring chose to continue them in that *use*, he had the same power over the goods, immediately on the commencement of this suit, as before.

The cases cited by counsel on both sides, I have carefully examined, and the weight of authorities will warrant the admission of Mrs. Claiborne's testimony. The case in 1 Stra. 504, goes even to permit the wife to be a wit-

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ness to charge the husband, further than the husband, in this case could be charged by the wife's testimony. The cases in Term Reports do not contradict that in Strange. As to the precedent, it can have no operation, but in similar cases :—every case should be decided according to its own circumstances. In the present case, Mrs. Claiborne had a bare *prospect*, a mere *hope*, that the goods might be returned to her; and that prospect was not destroyed or affected by this suit. An heir apparent, and even a son never has been considered an incompetent witness for the father, although he might be expectant of a large fortune at a future day. 7 Term Rep. 480, Ilderton vs. Atkinson, is a case in point. *There*, a man in the character of an agent received a sum of money from the defendant to the use of the plaintff: upon a suit against the debtor for the same sum, the plaintiff denied the agency, and objected to the competency of the agent to prove his own powers. The court considered him liable no more to the one than the other, and admitted him as a competent witness. This may be considered as over-ruling the case of Davis vs. Dinwoody.

I concur in opinion that Mrs. Claiborne was a competent witness; that the judgment should be reversed and a new trial awarded, with directions to the District Court to admit the testimony of Mrs. Claiborne, whose credibility will rest with the jury.

Judge LYONS. I cannot conceive any thing more dangerous to creditors and purchasers than to admit a wife as a witness to prove that the personal estate held by her husband, upon the possession of which he obtained credit, did not belong to him, but was lent to her by a friend; which would put an end to all credit on the mere possession of personal property, and open a broad door to fraud, deceit and perjury.

Possession alone is *prima facie* evidence of ownership, and obtains credit to the possessor every where. That is the only criterion by which the people generally can judge of his property; and what will be the situation of merchants, tradesmen and purchasers, if they are liable to be defeated and defrauded of their just debts and purchases by the evidence of the wife that the property did not belong to the husband, but was only lent to him or her? Would it not encourage fraudulent combinations to obtain false credit? Let the husband only make a friend of a third person to claim the property as lent, and the wife is ready to prove

it, without any other proof as to prior right or even possession in the lender, or that he had ever owned, or even seen the articles that were said to have been lent.

There is no proof in this case that the articles claimed by Baring as lent by him were ever so lent, or were ever possessed by him, except the deposition of Mrs. Claiborne referring to Baring's letter mentioning the loan; and, surely, such a letter may be easily framed by any person combining in a fraud to answer the purpose of protecting the property from creditors or purchasers: not that I would impute any fraud to Mr. Baring in this case, but I must guard against its being practised by others, and not establish a precedent that may in any way encourage or countenance such fraudulent practices to the manifest injury of fair creditors and purchasers by holding out a false credit to the world to deceive and impose on mankind. Peake 180, 2d London edition, Walton vs. Shelly.

Courts have a right to determine on the competency of witnesses, and to disallow such as are incompetent, if their evidence is objected to by either party.

Husband and wife are considered as but one person in law. She is under his controul, and subject even to his correction; "which, although, doubted, as Mr. Blackstone "says, in the polite reign of Charles the 2d, yet the lower "rank of people, who were always fond of the old common "law, still claim and exert their ancient privilege, and the "courts of law will still permit an husband to restrain a "wife of her liberty, in case of any gross misbehavior;" for which he cites Strange, 478 and 875.—1 Bl. Com. pa. 445.

Witnesses may be examined upon their voir dire, or their interest may be proved in court, and such as are interested in the event of the cause are not to be received or examined—1 Bl. 370.

Ought a wife to be received in a cause to prove a fraud on her husband? Lord Coke says she is not to be examined against her husband, (Co. Litt. 6,) and, even in a matter where she was only concerned as executrix, she was disallowed—2 Ch'y Cases 39, Str. 1094—Hill vs. Hill. She cannot be a witness for a person jointly indicted with her husband, (2 Str. 1095, and 1 Str. 633,) and, if not, surely not in one against her husband alone. The reason of all these cases is founded on the impolicy of permitting husband and wife to give evidence for or against each other.

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BARING against BARING.

Again. No person is allowed to invalidate his own act —1 Durnford and East, 380: nor to prove his own turpitude, Cowper 199. Surely, therefore, Claiborne ought not to be allowed to invalidate his own deed, or prove his own turpitude; neither ought his wife to prove it on, or for him.

In the case of the King vs. the inhabitants of Eriswell, reported in the appendix, No. 1, to Peake's Law of Evidence, and in 3 Term Rep. 707, the Judges were divided upon a question of evidence, Grose and Kenyon being on one side, and Buller and Ashurst on the other. Lord Kenyon then said that "all questions upon the rules of evidence are of vast importance to all orders and degrees "of men; our lives, liberty and property are all concerned in the support of these rules founded upon good "sense, &c." In the course of his observations, he mentioned "that, in the King vs. Nuttley, Burr. 701, the "whole of the wife's evidence was disregarded; that, in "Baldwin vs. Blackmore, 1 Burr. 595, Justice Foster "had treated the argument with indignation that *communis error facit jus*; had allowed that it might sometimes "be true, but "hoped he should never hear that rule in"sisted on to set up a misconception of the law in destruc"tion of law." The mistakes of Judges, said Lord "Kenyon, provided they became universal, would, ac"cording to that doctrine, become rules of law, and, "working injustice every day, if persisted in, would su"persede the law."

There can be no general rule, it is said, without an exception; but exception upon exception, refinement upon refinement bring the rule to nothing; so that it would be better if no rule existed, and then discretion alone would govern.

There is nothing, concerning which the Judges of England differ more, than rules of evidence; they have been so often vexed and perplexed, as Chief Justice Ryder said, if cases cited were over-ruled by subsequent Judges; and certainly *we* have the same right to over-rule their determinations.

Lord Mansfield and Lord Hardwick were generally inclined to let objections go to the credit rather than competency of witnesses, exercising a right of making observations to the jury concerning their testimony as the nature of the case should require, a right and a practice which the courts are not allowed in this country to indulge, as encroaching too much on the province of the ju-

ry. Yet Lord Hardwick, in the case of Barker vs. Sir Wealston Dixie, (Cases Temp. Hardwick 264,) would not allow the plaintiff's wife to be examined, notwithstanding the defendant was willing, and Lord Mansfield decided in the same way, in the case of Bentley vs. Cook, cited in 2 Term Rep. 265.

Newman, 1806. Baring against Reader.

Lord Kenyon, in a late case of Jordaine vs. Lashbrook, 7 Term Rep. 601, after recommending consistency in rules of evidence, and talking much about its vast importance, ever-ruled the decision in Walton vs. Shelly, reported in 1 Term Rep. 296, declaring that case not to be law, and allowed the payer and endorser of a bill of exchange to prove that the bill was void in its creation! For my part, I conceive that the case of Walton vs. Shelly was the best law, and ought to prevail against the latter opinion, which opens a door for fraud and perjury.

Factors and agents are allowed to be witnesses, as servants not interested; but if any way liable to the principal or employer, he must release them from all actions before they can be admitted. If, therefore, Claiborne and his wife were considered as agents or trustees in this case, Baring should have released Claiborne, and she should have been sworn on a *voir dire* before she was allowed to be a witness; and, even then, much might have been objected to her credibility, as she was to have the use of the furniture, &c. during her own pleasure, according to Baring's letter. But, certainly, until Claiborne was fully released, I do not think she was competent.

As to Reader's suffering Claiborne to keep possession of the goods, after Claiborne had made a deed for them, or the deed's not being recorded within eight lunar months, I do not consider either question material in this case, as Baring was not either a creditor or purchaser, but claims as a mere lender, and, without the aid of Mrs. Claiborne's evidence cannot prove even that; for, if he had had any other evidence, he would and ought to have proved it, in delicacy to Mrs. Claiborne, who was not only wife of Claiborne, but sister of his own wife; so that he has no right to make the objection, having not recorded his loan or given any notice of it, to prevent a sale of the goods lent, or credit being improperly obtained by the person who had them in possession.

It has been said that Claiborne is not interested because he is liable to both parties; but how can Claiborne be liable to Baring, except by the evidence of his *wife*, who is the only witness to prove the loan, or his knowledge of

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BARING *against* REEDER.

its being a loan only and not an absolute gift to her? Surely, then, he could only be liable to Reeder, and is therefore an improper witness against his own deed, which affirmed the goods to be his, and warranted them to Reeder.

So that upon every view of the case, as to impolicy or fraud, I think the opinion of the District Court was correct in disallowing the wife to be a witness.

I will further observe, 1. that the verdict was not against evidence; 2. that the damages were released to the satisfaction of the Judge who could best determine that matter; 3. that there could be no surprise, as to the rejection of Mrs. Claiborne's evidence, because the objection was reserved when her deposition was taken; and, 4. that the new matter was no cause for a new trial, as Claiborne's affidavit was no proof; and Fairfax might have been produced at the trial; and the damages released amounted to more than the articles left by Baring, according to the opinion of the Judge who tried the cause. I am therefore for affirming the judgment.

But, a majority of the Judges being of a different opinion, the judgment is to be reversed and a new trial awarded, with directions to admit the deposition of Mrs. Claiborne to be read as evidence at the trial of the cause.

Monday, 17th Nov.

ARMISTEAD *against* BUTLER'S ADM'R.

In an action of *assumpsit* for a partnership demand, the defendant cannot give in evidence, as a set-off, the delivery of goods to an individual partner; altho', by the direction of such partner, the partnership demand was entered as a credit against the goods.

THIS was an appeal from a judgment of the District Court, held at King and Queen court house.

Pannill and Butler as joint partners, brought *indebitatus assumpsit* against the appellant for freight and demurrage of a vessel. The suit having abated as to Pannill by his death; it was prosecuted by the surviving partner. At the trial the defendant "offered to prove payments made "to Pannill one of the acting partners (by crediting his "account, for goods sold and delivered to the said Pannill, "by the direction of the said Pannill, by the amount of "what he was owing on account of freight for employing "the said vessel of the plaintiff's,) but the court refused "to let this evidence go to the jury." To this opinion the defendant excepted; and, a verdict and judgment being had against him, he appealed to this court. The appeal was entered on the docket on the 11th day of June, 1803.

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ARMISTEAD *against* BUTLER'S Adm'r.

And now *Hay*, for the appellee, moved to take it up, out of its term, as a delay case, conceiving that the only point arising in it had been so fully settled in the case of Scott vs. Trents, (1 Wash. 77,) that no lawyer would undertake to argue it.

Randolph, for the appellant, at first supposed that this cause would require argument. But afterwards he admitted, that upon a more minute inspection of the record he could not distinguish it, in principle, from the case of Scott vs. Trents, determined by this court. And if that was to be considered as a ruling case, he should submit the cause, with this suggestion only, whether the delivery of the goods to Pannill, at his request, and direction by him to enter them against the partnership demand, did not amount to payment.

By the whole court, (absent Judge *Fleming*,) the judgment was affirmed.

The court will take up a cause, out of its turn on the docket as a *delay case*, if the only points in it had in another case been decided, by the court, against the appellant.

BAKER *against* SEEKRIGHT, lessee of GLASCOCK.

Monday, 17th Nov.

THIS was an ejectment, brought in the District Court, by the appellee against the appellant. The declaration claimed the lands by the ordinary description. A *mesne deed of conveyance* under which the plaintiff claimed, called for the line in dispute by *course* and *distance* only. At the trial, the lessor of the plaintiff offered evidence, that a particular line represented on a plat in the cause, was well marked, and was the line of the plaintiff's land. To the admission of this the defendant objected, and prayed the opinion of the court, whether, as the call of the deed was for course and distance, without any other boundary, natural or artificial, parol evidence should be admitted to prove any marked trees, not in the course or termination of that line as called for in that deed, to be the true line called for or intended in the aforesaid deed. The court was of opinion, that such evidence was admissible. To this opinion an exception was taken. There was a verdict for the plaintiff for the lines from H to A, thence to B, thence to A, and from thence to H, and for one penny damage. The judgment was for the plaintiff for his term, yet to come, of and in the lines aforesaid and the penny damage. From which judgment an appeal was taken to this court.

When a deed mentions the course & distance of a line without any other description thereof, parol evidence is admissible to prove marked trees not in the course or termination of that line to be the true line intended.

That the term stated in a declaration in ejectment has expired, previous to the decision on an appeal, is a circumstance of no importance.

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BAKER *against* SEEKRIGHT &c.

Botts, for the appellant, made the following points; 1st that the decsription of a line by words of plain unequivocal import in a deed of mesne conveyance, cannot be contradicted by oral evidence.

2d. That the grantee under such mesne conveyance, claiming under the same exclusively, must be limitted, in every respect, by the terms of the deed creating that claim.

3d. That such grantee must locate his title according to the description of the lines made out in the deed, giving birth to such title, and not according to oral proof of other lines inconsistent therewith.

4th. That as a man cannot obtain title to land by oral proof, that the lines bounding the same, are his without a deed, *a fortiori* he cannot obtain title by oral proof of lines inconsistent with the deed under which he claims them.

5th. That a verdict and judgment for lines from letter to letter, without describing on what these letters are.... whether in a plat, report, or any thing else....and when these letters could not be found in the woods by the sheriff, are variant from the declaration and issue, insensible, uncertain and void.

6th. That the term having expired since the judgment of the court below, so much of the judgment as goes for the term yet to come cannot be affirmed so as to justify a new judgment in the District Court in conformity with the certificate of such affirmance (*a*).

(*a*) 6 Ba ab. 433, Skinner 161.

Edmund J. Lee and *Call*, for the appellee, relied on the opinion of Judge *Pendleton* in Shaw vs. Clements (*b*), and the cases of Herbert vs. Wise (*c*), in this court, and Taylor's Rep. 117, as conclusive authority to shew that the evidence, which was admitted by the District Court, was proper and competent in this case: that the plat referred to in the verdict of the jury was expressly made a part of the record, by the appellant, in her own bill of exceptions; and that it not only precluded her from making any objection to it, but furnished sufficient information to the sheriff to enable him to give possession to the plaintiff, who must always take it, at his own peril.

(*b*) 1 Call 429.

(*c*) 3 Call 239.

Wednesday, November 19th. By the whole court, (absent Judge *Fleming*) the judgment of the District Court was affirmed.

AT

A SPECIAL COURT OF APPEALS*

HELD

AT THE CAPITOL IN THE CITY OF RICHMOND,

On Thursday, the 20th of November, 1806.

PRESENT

Judges LYONS and ROANE } of the Supreme Court of Appeals.

WHITE, STUART and HOLMES } of the General Court.

RANDOLPH'S EXR. *against* RANDOLPH'S EXRS. and others. THURSDAY, 20*th Novemb.*

ON an appeal from a decree of the High Court of Chancery, whereby a Bill of Review filed by the appellees against the appellant had been sustained, and relief granted pursuant to the prayer of the bill.

Additional circumstances, merely *confirming* facts proved in the original cause, do not furnish sufficient grounds for a Bill of Review.

The original bill (which was exhibited, in March 1791, by the appellees as representatives of *John Randolph* against the appellant and others executors of *Richard Randolph*) stated, that *Richard Randolph* the elder, (father of *Richard Randolph* the younger, and of *John Randolph*) died in 174–, leaving a widow and several other children therein named, (but all since dead,) among whom was the said *Richard* the younger, who was one of his executors; that by his will, proved in 1749, he devised a large estate real and personal to his sons, part of which consisted of 50,000 acres of unpatented land in the county of Bedford, one fourth whereof, by a residuary clause in his will,

Where a Jury have found a verdict for the plaintiff in an action of debt on a bond, an account of transactions, which (altho' partly subsequent to the date of the bond,) are old

* A Special Court of Appeals is constituted whenever all or a majority of the judges of the Supreme Court of Appeals are interested in a case brought before them.—See, as to the manner of organizing this court, *Rev. Code* chap. 63, p. 61, sect. 5, 6, 7, 8, 9, 10.

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and stale, ought not to be allowed, for the purpose of obtaining a discount against it.

was given to his said son *John;* that *Richard* the younger took possession of the whole estate, received the profits, collected the debts, sold the abovementioned tract of land, and received the purchase money; but made up no account of administration; nor did he ever come to a settlement with *John* for his proportion of the residuary estate;—that *John* (being very young at the death of the testator) continued to live with his brother *Richard*, who received the profits of his estate, furnished him with necessaries, and, probably, made him advances of money, even till after he came of full age; that, in 1764, *John* executed his bond to *Richard* for £635 15 1; merely, it is believed, as an evidence of advances made by him to *John;* and not as the result of their mutual accounts, which were afterwards to be settled; that *John*, in negotiating a loan of £4000 sterling from *Capel & Osgood Hanbury* of *London*, paid them, out of that sum, £960 13 6 sterling, on account of a debt due them from the estate of *Richard Randolph* the elder; that this payment (which was evidenced by a mortgage, from *John Randolph* to the *Hanburys*, dated in 1768,) was made with the privity and approbation of *Richard* the younger, and was chargeable, of course, to him as executor, to be accounted for at the final settlement; that, (*John* and *Richard* the younger being both dead,) *D. M. Randolph* (the son of *Richard* the younger and one of his executors) having acquired by assignment from his father in his lifetime the bond of £635 15 1, instituted a suit thereon in the General Court, and recovered a judgment for the full amount, although the accounts of the administration of *Richard* the son had never been made up, and *John* had never been reimbursed for the payment to the *Hanburys;* that *D. M. Randolph* refused to render any account of the administration aforesaid, or to allow any credit for the said £960 13 6, although the circumstance that the bond had lain more than 20 years without any demand of payment furnished a strong presumption that some right to a set-off existed; and although it was evident, (since the payment to the *Hanburys* was subsequent to the date of the bond, and to discharge a debt properly payable by *Richard* the younger, in his character of executor, out of the estate of *Richard* the elder, which was amply sufficient; since no account of his administration had been made up;—and a receipt from the *Hanburys* to *John*, also subsequent to the date of the bond, which receipt had been mislaid, expressed the said payment to have been made on account of a debt due from

the estate of *Richard* the elder;)—that some future settlement was intended to have taken place between *Richard* the younger and *John;* and that *D. M. Randolph* knew those objections to the discharge of *John's* bond before he accepted an assignment of it.

The prayer of the bill was for a full discovery and answer by *D. M. Randolph* as to the consideration for which the said bond of £635 15 1 was given, and the consideration of the assignment to himself; for satisfaction for the payment of £960 13 6 made as aforesaid to the *Hanburys;* for an account to be taken of the administration of *Richard* the younger on the estate of *Richard* the elder, and a settlement of all accounts between the estates of *John* and of *Richard* the younger; for an injunction to the judgment of the General Court rendered on the bond of £635 15 1; and for general relief.

To this bill was annexed the affidavit of *Jerman Baker*, stating, that, about the year 1774, he was appointed, by the Court of *Henrico* County, a commissioner to examine the account of the administration of *Richard* the younger on the estate of *Richard* the elder; that some progress was made in the settlement, but the interruption of business occasioned by the war prevented it from being finished; and he believed that *Richard* the son never made any settlement of his executorship, nor of the accounts between him and his brothers.

The answer of *David Meade Randolph* states that, in 1785, he accepted from his father, *Richard Randolph*, an assignment of the said bond, as an indemnity for a securityship, and for advances of money previously made; that his father, he believes, was the only acting executor of *Richard Randolph* the elder, the payment of whose debts nearly absorbed his whole estate; that of the *Bedford* lands he knows nothing, but had understood they were barren and not worth sixpence an acre; that he knows not whether they were ever patented or sold by his father; that *John* was an expensive young man, and lived with *Richard* till his marriage, which was some time after he attained his full age; that *Richard* annually furnished him with large sums of money, and imported goods for him to a considerable amount; that an account annexed from the books of *Richard* showed that in 1762 and 1769 a larger sum was due from *John* than the amount of the said bond, and that both anteriour and subsequent to 1769, there had been but little variation in the state of their accounts; that although *Richard* might not have settled the accounts of

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his executorship, yet the circumstance that the bond had been given by *John* after he came of age was an evidence that it was due, and that a Court of Equity, after such a lapse of time, will presume so; that *Virginia* estates, especially at a distance, are well known to be unprofitable; that the various circumstances of *John's* being the brother of *Richard;* of the occlusion of the courts by the war, and the consequent exception of time from the statute of limitations, sufficiently accounted for the bond's having lain so long undemanded; that *John* must have been 26 or 27 years of age when he executed the mortgage to the *Hanburys;* and the payment made to them is supposed by the respondent to have arisen from the knowledge of *John* that he owed so much to his father's estate; that the facts stated in the bill appear to be the suggestions of *Jerman Baker*, who knew much of these transactions, and who, upon seeing the bond before suit was brought, observed that he was satisfied it was due.

The exhibits filed were, 1. The will of *Richard Randolph* the elder, dated in 1747, and proved in 1749. 2. The mortgage from *John Randolph* to the *Hanburys* dated in 1768, reciting the loan of £4000 sterling, and the payment by *John* to them of £960 13 6, on account of the estate of *Richard Randolph* the elder, which mortgage was recorded, in the same year, in the General Court. And 3. An account of *J. Hanbury & Co.* against the estate of *Richard Randolph* the elder, for balance of a certain *John Randolph's* account amounting, in May 1751, to £493 10 8.

Upon a hearing, in March 1799, the bill of *John Randolph's* representatives was dismissed by the Chancellor;—and, on an appeal to the Supreme Court of Appeals, that decree was affirmed. (See 2 Call, 537.)

But in May, 1801, those representatives were permitted to file a bill of review; which states, that all the foregoing proceedings took place; that since March, 1799, when the original suit was finally heard in Chancery, they have discovered a paper, unequivocally showing the payment aforesaid to the *Hanburys*, about four years after the date of *John's* bond, for the benefit of *Richard* the younger; that *Thomas Randolph*, executor of *John*, has never heard of this paper, and, from infirmity, has taken no part in the transactions of the estate; that *John's* representatives ought not to be bound by a decree, in which the said *Thomas Randolph* was a nominal plaintiff, and the suit itself was unattended to; that *Richard* the younger was the *guardian* of *John*, who attained full age in 1763; that

John's bond to *Richard* the younger was dated in 1764; and in 1768, *John* paid to the *Hanburys*, for *Richard* the younger, at the mansion house of the latter, £960 13 6 sterling; that *John* lived for more than ten years after the date of his bond; and no payment was demanded of him;—nor was it assigned to *David M. Randolph* until 20 years afterwards; that the executrix of *John* often called upon his creditors to present their claims, and she never heard of this; although *Richard* the younger was under great pecuniary embarrassments, and was not restrained by any cordiality between the families; that the *John Randolph*, mentioned in the account exhibited by *D. M. Randolph*, plainly related to a different *John Randolph*, who had been a ward of *Richard* the elder.—The prayer of the bill is for a review and reversal. An amendment was filed to the bill of review; stating, that *John's* minority continued fourteen years; that he was educated at an expense of not more than £50 *per annum;* that his education and maintenance were to be at the cost of his father's estate; and he was not to have possession of his estate, which was very productive, until full age; that the residuary estate of *Richard* the elder was very productive.

The answer of *D. M. Randolph*, to the original bill of review, says, that he pleads the former decree; that he doubts not the receipt of *Hanbury's* agents, set forth in the bill; that he admits *Thomas Randolph* of *Dungeoness* to be a nominal defendant; that he insists, however, that the present claim is not varied from the one already decided and now sought to be reviewed; and is merely argumentative. In his answer to the amended bill, he denies the productiveness of the estate of *Richard* the younger; and repeats in substance, what he had before said in his first answer; admitting that the accounts of the administration of *Richard* the younger had never been settled.

The deposition of *St. George Tucker*—He intermarried in 1778, with *Mrs. Frances Randolph*, the widow of *John*, but meddled not with the settlement of the accounts. *John's* executors paid 30 or 40,000 dollars into the treasury, in satisfaction of his mortgage to the *Hanburys*. She often complained, that *John's* estate should have been mortgaged to them for paying a debt of *Richard* the younger and his brother *Ryland*, and urged *John's* executors to bring a suit. She said, that *John*, though dissatisfied, had been restrained by affection for *Richard* the

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younger from suing him; that she always considered *John's* mortgage to the *Hanburys*, as an accommodation to *Richard* the younger. The delay of a suit against *Richard* the younger may be ascribed to the death of one executor, the necessary absence of another, and some backwardness in the counsel spoken to, to sue an old friend. *Tucker* never heard of the bond in question until 1785 or 1786; and *Mrs. Frances Tucker* declared, that she had never before heard of it. At length in December, 1787, *Tucker* issued a subpœna in chancery in this business; about which time *Mrs. Tucker* died. The bill was filed in April, 1788, and contained the information received from her; but the suit was transferred by the defendants to the Circuit Court of the United States; and abated by the death of *Mrs. Tucker*.

The deposition of *Everard Meade*—The estate of *Richard* the elder was very productive; and made 100 hogsheads of tobacco every year. He was intimately acquainted with *John*, and often heard him say, that *Richard* the younger was indebted to him, and that he was afraid that he should be obliged to sue him.

The deposition of *Paul Carrington*—He speaks of the fertility of *John's* lands, and the great crops which were made on them, and were received by *Richard* the younger. The detail is minute, and tends to show, that *John* never could have received satisfaction from *Richard* the younger.

The exhibits are—

1. The account of the agents of the *Hanburys* for £960 13 6 sterling, against the estate of *Richard* the elder; and their receipt of that sum from *John Randolph*. 2. A similar account and receipt for a payment made to the *Hanburys* by *John* for *Ryland Randolph*. 3. A letter from *John Randolph* to *Richard* the younger, dated Feb. 19, 1775, speaking of the obligations of the former to the latter. 4. A letter from *Jerman Baker* to *John Randolph*, dated Dec. 11, 1772, desiring him to bring all the papers between him and *Richard* the younger. 5. Another letter from *Baker* to *John Randolph*, June 30, 1772. It speaks of *Richard* the younger having been with *John*, and *Baker* supposes, that they have determined on some mode of settling their accounts; and that he, *Baker*, will go to the house of *Richard* the younger and get the papers necessary for making out the account. 6. *John Randolph's* will, dated July 25, 1774, and codicil, dated October 3, 1775. 7. Several judgments of *Watkins* against *Richard* the younger, and of *Ware*, executor of *Jones*, against the executors of *Richard* the younger. 8. The decree of the

Court of Appeals. 9. Copies of the bill and amended bill, to which *St. George Tucker* refers in his deposition.

The High Court of Chancery determined upon these proceedings on the 10th day of September, 1801, that the bill of review should be sustained, and the injunction to the judgment of *D. M. Randolph*, on the bond of *John* should be perpetual. From which decree an appeal was taken to this court.

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Call, for the appellant. The first point to be considered is, whether it be in the power of a Court of Chancery to allow a bill of review to a case decided by this court. In *Curry* v. *Burns*, (*a*) this question was much agitated but not decided.

(*a*) 3 Call, 183.

But, if a bill of review were allowable in such cases, I shall next contend, that sufficient matter was not furnished in this case whereon to ground it. This bill of review presents the same case as the original bill. It seeks the same discovery and relief. The answer is the same; the witnesses are the same; and the plaintiffs were as conusant of the first cause as of the present.

The new evidence introduced is unimportant. The receipt for the nine hundred and odd pounds paid to the *Hanburys* proves nothing more than had already been proved by the mortgage. The large crops spoken of by *P. Carrington* must have been presumed before, from such a large estate. This circumstance had no weight in the original suit, because, from the length of time it was a fair presumption that all accounts respecting them had been settled. [Here *Mr. Call* referred to the argument in the original cause. 2 Call, 545.] But *Mr. Carrington* does not speak of large crops from his *own knowledge*. It is, in fact, nothing but hearsay evidence.—The deposition of *St. George Tucker* is irrelevant. He recites the mere hearsay declarations of his wife; that there had been no settlement of accounts between *John* and *Richard*. This, however, seems to be contradicted by *John's* giving his bond for the money, and a mortgage on his land, to secure the payment to the *Hanburys*. The bill filed by *Tucker* does not even state that there had been no settlement of those accounts. The presumption is that *John Randolph* was indebted to the estate of *Richard* the elder in this sum, and gave his own bond for the amount; for, the estate of *Richard* being sufficiently ample, there was no temptation to the *Hanburys* to transfer the debt.—The letters of *Jerman Baker* were objected to in the High

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Court of Chancery, and they are objected to here; because they are not evidence, but only a correspondence between third persons. The affidavit of *Baker* is the same as that filed in support of the original bill; and is merely an *ex parte* proceeding.—The first suit brought by *Tucker* has no influence, because it did not demand an account, but only a repayment of the nine hundred and odd pounds. But, even if it had demanded an account, the argument from the length of time would have been irresistible: for the suit was brought in 1788, and the testator died in 1749.

It is not enough to produce *new* evidence on a bill of review; the party must show that he could not command it in the original suit. All the depositions taken in this case might have been taken before. But new testimony, (if admissible,) must make a *new case;* and ought to be sufficient of itself to found a decree, without the aid of the former testimony. Would the *new* testimony in this case warrant a decree in favour of the representatives of *John Randolph?* [On the doctrine of Bills of Review, *Mr. Call* referred to *Hinde's Practice*, 56, 57, and his own argument in *Curry* v. *Burns*, 3 Call, 188.]

Other circumstances must be considered, if the *merits* are to be discussed. It will be said, on the other side, that they do not demand an account;—they only *presume* that the bond has been paid. Let it be remembered that *a jury* (whose province it emphatically is to judge of presumptions) has sworn that it was not paid. If they mean to *presume* that the profits of the estate were sufficient to absorb the bond, then they only ask, in another form, for an account. After such a lapse of time, all the books agree that an account cannot be demanded. (*b*) In like manner, if legatees sleep an unreasonable length of time, and do not demand their legacies, a Court of Equity will presume them paid. (*c*) So will a mortgage be presumed to have been paid after 20 years;—unless there be strong circumstances to rebut the presumption. And, though there is no limitation to a bill of review, yet after 20 years, a Court of Equity will not reverse a decree. (*d*) If the court will presume an *ascertained debt* to have been paid after that length of time, there is much stronger reason for presuming the payment of *the profits of John Randolph's estate.*—After a certain period, merchants' accounts are presumed to have been settled; notwithstanding they are excepted out of the statutes of limitations. (*e*) The same rule is well known to apply to a bond. An account of rents and profits cannot go beyond six years, in

(*b*) 4 Bro. Ch. Rep. 258. *Hercey* v. *Dunwoody*. 2 Ves. Jr. 87, S. C.

(*c*) 2 Ves. Jr. 11. *Jones* v. *Turberville*.

(*d*) 3 Bro. Ch. Rep. 639.

(*e*) Watson's Law Partn. 212.

England;—by analogy to the action for mesne profits. (*f*) We shall be told of the tobacco mentioned in the will of *Richard Randolph*, *the elder*, as being in England. This circumstance has no weight; because he lived two years after the making of his will, and probably drew the proceeds of the tobacco himself: or, it might have gone towards the support of his family, and a provision for his daughters.

If it be said that *John Randolph* was to be supported out of the estate; it may be answered, so were all the family.—If his estate went to maintain others, the estate of others went to maintain him. The legacies were to be paid after the expenses of the family were deducted; and *John* being the youngest child, his estate was therefore exhausted.

The letters from *John Randolph* to his brother *Richard* speak of his obligations to him; and are evidence that *Richard* had done him justice.

(*f*) 5 Ves. Jr. 744. *Reade* v. *Reade*.

Hay, for the appellees. It is to be regretted that *Mr. Call* should have entered into an investigation of the subject, upon points, which he was well aware would not be insisted on by the opposite counsel. This court having decided that the giving of a bond precluded a settlement of accounts prior to its date, it must have been obvious that no account of the profits of *John Randolph's* estate, anteriour to the bond, would be demanded by his representatives. Our only object is to obtain a credit for the payment of the nine hundred and odd pounds made by *John Randolph* to the *Hanburys* on account of a debt due them from the estate of *Richard Randolph* the elder;—to be applied, as far as necessary, to the bond given by *John* to *Richard Randolph the younger*, the executor of *Richard the elder*.

He then proceeded to discuss the merits.

In this cause, the counsel for the appellees admit, that the judgment, of the Court of Appeals, in the original suit, is conclusive, so far as it decides questions arising from *the facts in the record then before the court.*

But they contend, that the cause, now before the court, is essentially different from that formerly determined.

This difference rests on two points:

1st. Since the decision of the original suit by the High Court of Chancery, and the translation of the cause to this court, a written document (admitted, in the answer

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to the bill of review, to be genuine) has been discovered, and is now exhibited.

This document proves, that, on the 20th day of *February* 1768, (almost four years after the date of *the bond*) *John Randolph* exonerated *Richard Randolph*, Jr. from a debt of £960 13 6 due from him (as executor of his father) to *Capel & Osgood Hanbury:* for which debt a suit was then depending in *York* County Court.

From the evidence in this cause, it is to be presumed that this debt was contracted by *Richard Randolph*, Jr. after his father's death. It was a debt therefore for which he was individually responsible. The evidence here meant is found in the will of *R. Randolph* the elder, which makes no mention of debts, though written apparently with great caution, and speaks of a large quantity of tobacco in the hands of *C. & O. Hanbury*, as well as others. In fact it is to be inferred from this very clause in the will that *R. R.* the elder was a creditor of the *Hanburys;* and, therefore, that the debt in question must have been contracted by *R. Randolph* the executor after his father's death.

This debt then of £960 13 6, due from *R. R.* Jr., being a debt for which he was individually responsible, the payment of it by *J. R.*, at his request, makes the latter a creditor of the former for so much.

A clearer position than that just stated cannot be presented to the mind: and, to make it an argument, conclusive in this cause, nothing more is necessary than to prove the truth of the facts on which it rests.

The first part of the proposition, "that the debt of "£960 13 6 was a debt for which *R. R.* Jr. was *indivi-* "*dually* responsible" it is presumed, is already shown to be true. But, even if this part of the proposition should be changed; and it should be stated, merely, that *R. R.* Jr. was indebted *as executor* of *R. R.* the elder, for transactions in the lifetime of the latter, the inference will not be affected. For, if an executor is sued for a debt contracted by his testator, and a friend pays the debt, *at his request*, this friend is the creditor of the executor, who is, unquestionably, *personally* and *individually responsible to him.*

The second part of the proposition, "that the debt was "paid by *John Randolph*," is now demonstrated to be true by the actual production of a receipt in full to *R. R.* Jr. from the persons to whom he was indebted;—an important fact not appearing in the other cause.

The third fact embraced by the proposition is no less material; and, in my estimation, no less *absolutely certain*. The consent of *Richard Randolph* Jr. to this payment is not proved by any written document; but, that *J. R.* stepped forward, and assumed the payment of the debt, *at the request of R. R.* Jr. is a very obvious inference from the facts proved, or admitted, in the cause.

In the first place, it is improbable that *J. R.* should have taken this debt upon himself, unless his aid had been solicited by his brother *R. R.* Jr.

Secondly, *R. R.* Jr. having *J. R.'s* bond for about £760 (*i. e.* £635 15 1 with interest from the 3d April, 1764,) had a right to require his aid in the payment of this debt.

Thirdly, *R. R.* Jr. *wanted* aid: for it appears, from the account abovementioned prefixed to *the receipt*, that he was actually sued in *York* County Court for this debt: and the writing by which that aid is given bears date at *Curles* the place of his residence.

Lastly, his possession of this bond, for more than 20 years, without suit or demand, and at a time when he wanted money, is a proof that he considered it as paid—The bond is dated 3 April, 1764; and is assigned 3 March, 1785;—20 years and 11 months afterwards.

Notwithstanding the answer to the amended bill, the fact that *R. R.* Jr. was embarrassed in his affairs, and that he wanted money is supposed to be proved. The answer to the original bill (in stating the consideration for the assignment of the bond to the defendant) expressly declares that the assignment was intended by *Richard Randolph* Jr. as an indemnity to the defendant for his securityships, and advances of money for his father the said *Richard* Jr.—Surely a man may truly be said to be embarrassed and to want money, when he applies to a son just entering into the world, for pecuniary aid, and when that son is in danger of suffering from his father's misapplication of a brother's effects.

John Randolph viewed this transaction in the same light in which (as has been urged) *R. R.* viewed it. This remark is founded on the circumstance that *J. R.* kept possession of the *receipt*. Why did he retain it, unless he regarded it as a document proving a claim against his brother? The reason why he did not urge this claim is obvious. He had only executed to the *Hanburys* a mortgage; and it would have been harsh in him to have pressed his brother for the difference between the bond and mortgage; (*i. e.* about £480) until he had actually paid

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it. But he did not pay it. (The payments which have taken place, have been made by his sons.) Thus we see clearly why no demand was made upon the bond, by *Richard* Jr. and why no demand was made for the surplus by *J. R.* on the mortgage and receipt, although *John Randolph* always regarded himself as a creditor of his brother.

There is nothing, then, in this case, which places it beyond the operation of a rule supposed to be universally true; that where a debtor, whose bond is payable, advances money to his creditor, or to another, at his creditor's request, he is entitled to a credit against his bond, for the advance thus made; unless it can be shown that he has got credit in some other way. The defendant's counsel, (feeling the force of this argument) suggest that the sum of £960 13 6 was *J. R.*'s own debt; that is, his proportion of the debt due to the *Hanburys* from the estate of *Richard* the elder.

That this suggestion is consistent with the unequivocal and correct declaration in the amended answer, "that the execution of the bond by *J. R.* to *R. R. Jr.* is, both in law and equity, to be considered as a settlement of all preceding transactions," will not perhaps be urged by the defendant's counsel.

But a *suggestion* is not sufficient, according to the doctrine above laid down: the suggestion must be shown to be true.

As far as proof is exhibited on this point in the cause, the fact seems to be directly otherwise. The estate of *R. R.* Senr. is charged, in the account prefixed to the receipt abovementioned, with the amount of an account proved— £894 11; interest £64 15 6; and costs of suit £1 7 0= £960 13 6. This sum then was manifestly the *whole* debt due from the estate of *R. R. Senr.;* being actually the debt for which suit was brought, and the payment of which, the receipt acknowledges to be a full satisfaction. This *John Randolph* undertook entirely to discharge. If *J. R.* had undertaken to pay *one fourth* there would then have been some colour to the supposition that he was paying only his proportion of the debt.

On this subject a remark occurs, perhaps worthy of notice. *R. R. Senr.* died, (as has already been argued,) not only clear of *debt*, but possessed of money or tobacco in the hands of his merchants. This was made a fund for the payment of his daughters' fortunes; £3000 sterling, (the only charge on the estate,) being to be paid by the proceeds of the sales of land claimed under an order of

council. These two funds united the testator thought adequate to the payment of the legacies. He even disposes of the surplus. Now, if the suggestion relied on be correct, the management of *R. R.* Junr. must have been wretched indeed, or his extravagance excessive. After a minority of fourteen years, *J. R.* is found to owe to his brother *R. R.* Junr. upwards of £600 currency, and to the *Hanburys* upwards of £900 sterling, while *R. R. Junr.* was in possession of an estate which had maintained his father's family, kept them clear of debt, left money in hand, and was actually increasing in value every year, by the accession of new labourers. Is this credible? In addition to this, it must be observed that *John Randolph* was entitled to his maintenance and education out of the estate generally, and was not, until he attained full age, to have the lands and slaves devised to him. *R. R.* Junr. could not therefore, in law or equity, either as guardian, or executor, charge *J. R.* with any part of his transactions with the *Hanburys* or any other persons: and, even if he could, it is to be presumed, (as this defendant himself remarks,) that all transactions were settled when the bond was given in April, 1764.

There is another debt comprehended in the mortgage.—Did *John Randolph* owe £1500 sterling to *Ryland* also? or did he generously pledge his estate for both his brothers?—He owed neither.

How is this reasoning repelled? The attempt to repel it is not made; but refuge is sought in the argument of counsel, and in the decision of this court, at the former hearing.

This cause, say the appellant's counsel, is precisely the same as it was before: in other words, the facts, that *J. R.* paid *to the Hanburys at his brother's request* £960 13 6, for which his brother was sued; that he procured their receipt in full for his brother; and, in order to secure the *Hanburys*, executed a mortgage; are, in substance, the same with, and no more than, the naked fact of the execution of the mortgage! A difference, no less material, than obvious, at once presents itself. The execution of the mortgage by *J. R.* for a debt recited to be due from *R. R.* Jr., as executor (which was all that appeared before the court at the hearing of the original cause,) did not, in law or equity, exonerate *R. R. A.*'s promise, bond, or mortgage to pay *B.*'s debt to *C.* does not exonerate *B.* The evidence now produced proves that *R. R.* Jr. was

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sued for the debt in the mortgage mentioned, and that he was completely relieved by his brother *J. R.*

The mortgage itself, though it stated, did not *prove*, that any debt was due from *R. R.* Jr. to the *Hanburys*. It was *probable*, but not *certain*. The evidence now exhibited *does prove* (as has been already shown,) that a debt was due; and that *J. R.* paid it at the request of *R. R.* Jr. Besides, the answer admits it unequivocally. *R. R.* was actually sued; and *the debt was settled at his own house*. What did the mortgage prove against *R. R.*? Nothing. At the former hearing, there was no evidence that *J. R.* ever paid a farthing of the mortgage. It is now alleged, without contradiction, and can be proved to be true, that the greater part, if not the whole of the mortgage, has been paid. But this is not material; because *R. R.* Jr. *was*, at all events, exonerated.

Are these distinctions *merely nominal?*

2. A second point, not appearing before the court in the original suit, but which *now* appears, is this: There never was a fair trial of the cause at law. The ground of defence against the bond is that payment has been made. This is a question of fact peculiarly proper for the decision of a jury: and this court, if not satisfied, will refer it anew to a jury, if there has been no default in the party requiring this reference.

In the case now before the court, the writ was served on *Mr. Tucker* the husband of the executrix—perhaps on the executrix herself. But she died long before the judgment, and of course *Mr. Tucker* ceased to be a party. The other defendants were *nominal* defendants only, and, in fact, on them no process was ever served. An appearance was entered for them; but the judgment passed without any defence; nor after the death of *Mrs. Tucker* was there a person in being competent to make any. *D. M. Randolph*, in his answer, admits that *Thomas Randolph*, the executor of *John*, was only a *nominal* plaintiff, and that it is probable he never knew of the institution of the suit.

It has been objected that a bill of review cannot be had after a decision by the Court of Appeals. This position is true in one branch of the subject; as to *errour of law apparent on the face of the decree;* but, unquestionably untrue, as it relates to a bill of review *on the discovery of new matter* (*g*). Even the discovery of such new evidence as has been exhibited in this cause, would be a ground for a new trial at law (*h*).

(*g*) See Mitford's Pleadings, 78, 79. 4 Vin. 413.

(*h*) 2 Wash. 36. *Ambler* v. *Wyld.* 2 Blacks. 955. *Broadhead* v. *Marshall*, &c. 3 Burr. 1771, *Fabrilius* v. *Cook.*

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But it is said that *John Randolph* assumed this money to the *Hanburys because he owed it*. *Mr. Call* forgot that *Richard Randolph* was at that time in possession of *John's* bond; and that, of course, he had a right to expect, from the *justice*, if not the *friendship* of his brother, some assistance in the payment of the debt to the *Hanburys*, for which *Richard* was then sued. But do not people often assume to pay money for others when they are not indebted to them? It appears from the same mortgage that *John Randolph* also undertook to pay a large debt for his brother *Ryland*. It is asked, what temptation could the *Hanburys* have to agree to a transfer of the debt from the estate of *Richard Randolph* the elder, (which was very ample,) to *John?* The mortgage furnishes a sufficient reason. It was to get a permanent security, and interest upon their money, according to the usual course of business at that period. We are entitled to a discount for this money against the bond: the other side must show that *John Randolph* owed it. The execution of the bond in 1764 precluded both parties from an investigation of prior accounts. How was it *possible* for *John Randolph* to have owed this money? He was entitled, under his father's will, to a maintenance out of the estate; and can it be possible, (considering the productiveness of his father's and his own estate,) that his proportion of a debt to the *Hanburys* could have been *nine hundred and sixty pounds!* But neither in law nor equity could *Richard Randolph* (who was his *guardian*) charge him beyond the profits of his estate.

We are told that no evidence can be adduced on a bill of review which might have been had in the original suit; and that all the testimony now brought forward was equally in the power of the party before.—To this it may be answered that the original bill was filed by *Jerman Baker* merely as the friend of *John Randolph's* representatives; that *Thomas Randolph*, his executor, knew nothing about the affairs of the estate, as is confessed in the answer; and that the representatives of *John Randolph* were all, at that time, infants. Who, then, was to step forward in behalf of this orphan and helpless cause?

It is argued that it is impossible to distinguish between a demand of an *account*, and the present claim for a *discount*. The account demanded in the original suit was of transactions before the date of the bond. The court decided that after such a length of time, and a bond had passed from *John Randolph* to *Richard*, the subject must forever rest.

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What we now claim is a *discount* against the bond, upon a transaction *subsequent* to its date.

As to the great affection expressed by *John Randolph* for his brother *Richard*, it only proves that he would the more willingly come forward, as his friend, to relieve him when sued.

Randolph, on the same side. The answer of *David M. Randolph* admits that no settlement took place between his father *Richard Randolph* the younger, and *John Randolph*. Consequently the bond of 1764 is not affected by the presumption arising from the length of time. As long as that bond exists, *John* has a right to a discount for so much as he made himself liable for on account of the estate of his father: for though *R. Randolph* the younger was the executor of his father, yet the debt being contracted after the testator's death, the executor was personally responsible. In 1763 *John Randolph* came of age; in 1764 the bond was given before he was acquainted with his rights under his father's will. The immense estate which passed through the hands of the executor, *Richard* the younger, (of which he never rendered any inventory or account) sufficiently proves that *John* must have been entitled to something considerable.

In 1775, *John Randolph* died: his bond to *Richard* was given in 1764: in 1768, he executed the mortgage to the *Hanburys*, payable in ten years: until the expiration of the time specified in the mortgage (*i. e.* 1778) *John* could not demand *the surplus of Richard*. A further reason for his waiting was, that the money due on the mortgage was paid into the publick treasury. If that payment had exonerated *John Randolph*, then *Richard* would have been liable for the surplus, according to the scale of depreciation only.—It was not until long since the revolution that what would be the effect of those payments was decided. The bond from *John Randolph* to *Richard* was not known to exist till the year 1785, when *Mrs. Tucker* mentioned the claim of *John* on the estate of his brother *Richard*. Her husband, for some time, declined any interference in the business; until, at length, (on her repeated solicitations,) a suit was brought in 1787, or 1788. This suit abated by her death; and her husband (who was only a nominal party) ceased to have any interest in the subject. If the general doctrine of presumptions may be repelled by particular circumstances, surely the particular circumstances enumerated in this

case will form a sufficient apology for the delay on the part of *John Randolph's* representatives.

The mortgage left it doubtful whether the money was paid or not. But the receipt, dated at *Curles*, (the place of residence of *Richard Randolph* the younger,) and subjoined to an account, headed, "Dr. the estate of *Richard Randolph* deceased, &c." proves clearly that *Richard Randolph* the younger (against whom suit had been brought for this same debt) was liberated by means of his brother *John's* undertaking to pay it.

None of the authorities cited by *Mr. Call* go to show that a bill of review will not lie in such a case as the present. In *Curry v. Burns* (*i*) it was not decided whether a bill of review might be brought, after a case had been determined in this court; and *Mitford* (*j*) only doubts whether it will lie for an errour in the decree itself after affirmance in parliament;—but expressly says that it has been permitted, upon discovery of new matter after such affirmance. It would be a mere mockery (said *Mr. Randolph*) to allow us a bill of review on the ground of new evidence unless we were permitted to show how such evidence would affect all the circumstances in the original cause.—If all the evidence and circumstances in this cause be considered, there can be no doubt but we are entitled to a discharge from the payment of the bond which gave rise to the original suit.

(*i*) 3 Call 183.

(*j*) Page 79.

Wickham, in reply. The counsel on the other side have considered this cause, as if it had never before been decided by this court, or by any other. Many of their arguments might have deserved attention, if most of the points had not been originally settled. But, after the prior decision, (upon the same evidence in substance,) the door is forever closed. Nothing is now produced, except what might have been brought forward before, either in a court of law or of equity. It is said, however, that the cause was neglected by the representatives of *John Randolph*. This is not to be presumed.—On the contrary it appears that *Mr. Baker*, who defended them at law, not only, after the judgment, drew the bill of Injunction, but made affidavit to it.

There is no evidence that the new matter was *discovered* since the determination of the original suit. Additional circumstances to facts before in issue do not furnish a ground for a bill of review. This bill *ought not to have*

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been allowed at all. But it is contended that, the bill having been granted, the parties may go at large into the evidence.—This court sits here to correct the errours of inferiour courts in every particular; and in the exercise of that power, they will judge whether the bill of review ought to have been granted, (on the new evidence brought forward in support of it,) or to have been refused.

What is this new evidence?—The deposition of *St. George Tucker* contains only the declarations of his wife founded on the information received by her from her former husband, *John Randolph*. The deposition of *Paul Carrington* proves, indeed, that *John Randolph* was in possession of a large estate; but it does not say that, (like most rich planters,) he might not have been largely in debt.

But their great reliance is upon the *receipt*. This does not materially vary the evidence arising from the mortgage. There could have been no doubt (when this cause was formerly before the court) that *John Randolph* had undertaken to pay this debt to the *Hanburys*. It is said, however, that the mortgage was only a collateral undertaking that the money *should be* paid. This was not a collateral undertaking on the part of *John Randolph;* but the debt was made his own. Could the *Hanburys* have demanded this money of *Richard Randolph*, after the mortgage? The court never would have dismissed the original bill, if it had been supposed that *John Randolph* merely *undertook to secure*, by a mortgage on his own estate, a debt due from *Richard*. The bill was dismissed because the court thought the debt was his own.

But it is argued that it does not appear that *John Randolph* owed any thing to the *Hanburys*. How does it appear that *Richard* owed them any thing? There is an account exhibited against *John*, and also against the *estate* of *Richard* the elder, and a *mortgage* given by *John;* but there is no account against *Richard* the younger, in his individual character; nor is there any evidence that the money secured by the mortgage was to be paid for the benefit of *Richard*.

There is no evidence that *Richard Randolph was* sued in *York* County Court for the debt which *John Randolph* secured by the mortgage on his estate. The *extract* certified by the clerk of the Court is not evidence, because not *the best:* and the rules of evidence, (which are the same in equity, as at law,) always require the best evidence the nature of the case will admit of.

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In the former argument it might have been asked (as it may be now,) how came *John Randolph* to pay *Richard's* debts? To this inquiry it may be answered, that not only all investigation of this subject is closed by the *deed of John Randolph;* but that the several sons of *Richard Randolph the elder*, being indebted to the *Hanburys* for dealings charged to his *estate*, paid their respective proportions as they came of age; and that *John*, (being the youngest) made provision for his part last of all. But why did not the appellees go to the *Hanburys* and ascertain the origin of this account? We (having in our favour a judgment at law, a decree in equity, and an affirmance by this court of that decree,) were not bound to make the inquiry.

It is asked, how is it possible that *John Randolph* could have been in debt, considering the affluence of *Richard Randolph the elder?* and his will is resorted to, in order to show the situation of his estate. This is a very uncertain criterion by which to judge of men's circumstances. Many large estates are bequeathed by persons who have little remaining after the payment of their debts.—He was probably much in debt.—It was the fashion of the times. If men were *active* the temptation to speculate in lands and negroes generally involved them in large purchases of that kind of property;—if *indolent*, they were in debt of course. "Why did *John Randolph* give his bond for this money?" The only rational presumption is, that the debt being due for advances made and articles furnished for the sons of *Richard Randolph* the elder, *John* was only called upon by the executor to give his bond for his own part.

But, say the counsel for the appellees, *Richard Randolph* was personally liable; and the payment made by *John* must have been for him.—This does not appear. The account of the *Hanburys*, headed, "Dr. the *estate* of *Richard Randolph*, &c." is conclusive evidence that the money was not due from *Richard*, (the executor,) but from the estate of his father. Every person, conversant with the mode of doing business in those times, knows that it was the constant practice to make advances for the use of the whole family of a deceased person, and to raise an account against his estate. Suits in Chancery against the children for their respective parts have been common. The probability is, that this debt was contracted by *Richard* at the instance of *John*, and for the purpose of establishing a credit by which he might purchase slaves with bills on London.—The expenses of settling every new

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estate in this country, were usually provided for by a credit in England.

The bond of *John Randolph* to *Richard*, together with interest, amounted, at the time when the former gave the mortgage to the *Hanburys*, only to between seven and eight hundred pounds *currency*—whereas the mortgage to the *Hanburys* was for nine hundred and odd pounds *sterling*. If the mortgage was to go as a satisfaction for the bond;—would not *John Randolph* have taken some voucher for the excess? and would he not also have taken up his bond?—But he did neither; and this is conclusive proof that the mortgage related to a different transaction.

Curia advisare vult.

Saturday, 22d November. The President delivered the opinion of the court—"That the bill filed in this cause, "for reviewing the decree and proceedings therein men- "tioned, ought not to have been received or allowed by "the High Court of Chancery; as it does not show any "new matter, or disclose, or refer to any new evidence, "sufficient to ground a bill of review, or reversal of the "decree prayed by the said bill to be reviewed and re- "versed, nor does the new evidence taken and produced "in this cause, in any manner prove or warrant the same."

Decree of the High Court of Chancery reversed;—Injunction dissolved, and bill dismissed with costs.

SELECT CASES

RELATING CHIEFLY TO POINTS OF PRACTICE

DECIDED BY

THE SUPERIOUR COURT OF CHANCERY

FOR THE RICHMOND DISTRICT.

IN THE THIRTY-FIRST YEAR OF THE COMMONWEALTH.

CREED TAYLOR, ESQUIRE,* CHANCELLOR.

JOHNSON and others *against* WHITE'S EXRS. *Monday*, 2d March, 1807.

Upon an appeal from a decree of *Pittsylvania* County Court.

In this cause, master Commissioner Greenhow made a report to the last term; and, early in the present term, the decree of the court below was reversed, and a decree entered agreeably to the report of the Commissioner, to which no exceptions were then filed: and now *Mr. Wickham*, counsel for the appellees, moved to set aside the decree and to file exceptions to the report.

Per Curiam. The eighteenth rule of this court requires that exceptions to reports should be filed thirty days before the *term* at which they may be acted upon; but, notwithstanding this, the rule will not be so construed as, at any time, to preclude a party from the benefit of exceptions; but the hearing of the cause is not to be delayed on that account; nor, unless the exceptions are filed within the time prescribed by the rule, and good cause be shown.

The exceptions may now be filed; and the entry so amended, as to let it appear they have been overruled; the court not perceiving in them any reasonable objection to the decree as it now stands.

A suit is not to be continued on the ground of exceptions to a Commissioner's report, unless they were filed thirty days before the term, and good cause be shown; but the court will receive such exceptions at any time; provided the hearing of the cause be not thereby delayed.

* The appointment of *Creed Taylor, Esq.* to the office of Judge of the Superiour Court of Chancery for the Richmond District, (which was noticed *ante* page viii,) was made by the executive during the recess of the General Assembly, according to the practice under the fourteenth article of the Constitution of this Commonwealth. That appointment was unanimously confirmed by the Legislature at their next session.

Saturday, 14th March, 1807.

LOWTHER *against* THE COMMONWEALTH.

On an appeal from a decision of the Auditor of Publick accounts.

Where land is sold with Warranty, & the Vendee is evicted, he ought to recover of the vendor, not the value of the land at the time of eviction, but the purchase-money, with interest and costs.

One hundred and seventy-three acres of land, belonging to *James Anderson*, late sheriff of *Harrison* County, were sold in 1791, for arrearages due by him to the Commonwealth; and the plaintiff became the purchaser, at the price of £ 81 10 0½ in *State-road-Certificates*, which were paid into the treasury. The plaintiff, in 1794, sold the land to one *Powers;* but at what price does not appear: *Anderson's* heirs (on account of some irregularity in the sale,) brought suit, in the superiour court of law held at *Morgantown;* and in 1798, recovered the land. *Powers* then brought suit, against the plaintiff, and, in 1799, recovered $ 901, and costs; the supposed value of the land and improvements, at the time of eviction, or recovery.—The plaintiff then applied to the Auditor of publick accounts to be paid the amount thereof; which the Auditor refused; and, thereupon, the plaintiff, upon his petition, was allowed an appeal to this court.

Randolph, for the appellant.

The Attorney General, for the Commonwealth.

Per Curiam. Upon what ground, the Superiour Court of Law at *Morgantown* determined in favour of *Anderson's* heirs, does not appear; but, probably, upon the one suggested by the Attorney General; however, be that as it may, it is a court of competent jurisdiction, and the judgment thereof remains in full force; and proves that *Powers* has been evicted from the land, and that he has recovered of the plaintiff the sum of $ 901, besides costs; and it is supposed (for it does not appear in the record) that this sum includes the price, with interest, which he gave for the land, or its value with the improvements, at the time of his *eviction*, or recovery.—The only question, therefore, is, what shall the plaintiff recover of the Commonwealth? Shall it be the sum recovered of him? or that which he gave when he bought at *Anderson's* sale?—

The opinion of the court is, that the value at the time of the *contract*, and not at the time of *eviction*, should form, in all cases of *warranty*, the true standard of damages, the rule for ascertaining which value should be *the*

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LOWTHER *against* the COMMONWEALTH.

price given. Powers, therefore, should have recovered of the plaintiff the price which he gave, with interest, and costs; and the plaintiff (by the same rule) should recover of the Commonwealth what he paid into the treasury; so that each person in turn will receive back, with interest, what he has advanced. For if the sum recovered by *Powers* comprehends the value of the place as increased, from any cause, not produced by himself, he should not, on that account, recover any thing more, of *any person*, than the sum he gave, with interest: and, if he had improved the place, he should not have recovered, (even at law,) of the *plaintiff*, for those improvements; because *they* were not sold by *him*, and of course no *warranty* on his part extended to *them;* but, for *such improvements*, *Powers* should recover *of those who evicted him*, and thereby took from him the fruits of his *own labour;* the value of which should be estimated at the time when he yielded possession thereof. Therefore, unless the parties will consent, (or their counsel for them,) that one of the master commissioners of this court shall report the value of the *State-road-Certificates*, paid into the treasury, by the plaintiff, an issue will be directed, to ascertain that value; the amount whereof, with interest, will be decreed to the plaintiff; and the auditor directed to issue a warrant upon the treasury for the same.

The parties consented that a commissioner might act in the case; and the counsel, on both sides, expressed their satisfaction with the decision.

CARTER *against* WASHINGTON and others.

Monday, 16th March.

Where the complainant in a Bill of Injunction dies; after answer filed, and before a decision of the cause; an order may be obtained, on the motion of the defendant, that, unless the representatives of the complainant shall appear, within a certain time fixed by the Court, and cause the suit to be revived in their names, the Injunction shall stand dissolved.

The complainant obtained an injunction, in this court, to stay waste. After the answers of the defendants had come in, and the cause was set down for hearing, the complainant died.

Botts, for the defendants, stated that the representatives of the complainant were numerous, much dispersed, and not well known; and that it would be difficult, if not

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CARTER *against* WASHINGTON and others.

impossible, to trace their persons, rights, or residence, so as to serve any order of court upon them. He therefore moved that an order might be entered, that, unless the representatives of the complainant should come in, before the end of the next term, and cause the suit to be revived in their names, the injunction to stay waste should stand dissolved,* as an act of this day.

Which motion was granted accordingly.

* See 2 Eq. Ca. Abr. 2. Note (*a*) in margin.

KENNER *against* HORD.

Where the defendant dies, after filing his answer to a Bill of Injunction, and before a decision of the cause; an order may be obtained, on the motion of his representatives, that, unless the complainant, within a certain time fixed by the Court, shall revive the suit against them, the Injunction shall stand dissolved.

The defendant, in this case, had died after the filing of his answer; and now *Botts*, for his representatives, moved that an order might be entered, that the injunction should stand dissolved as an act of this day, unless the complainant, on or before the last day of the next term, should revive the suit against the representatives of *Hord*. He cited the order, in the case of *Carter v. Washington*, as in point.

Per Curiam. A difference may, perhaps, be taken between the two cases: and the rules of the court should be settled on very mature deliberation. At a subsequent day, the judge observed that the motion had been considered by the court; that no distinction, in principle, could be discovered between this case and that of *Carter v. Washington*, and that the order might be entered as moved for.

N. B. An agreement at the bar prevented the entry.

Friday, 27th March.

MARR'S Admr. *against* MILLER'S Exr. and others.

An erroneous entry of a Decree may be rectified upon motion, at a succeeding term; and any mistake committed by the officers of the court or gentlemen of the bar may be corrected in like manner.

At the last term, a decree was improperly entered in this case, by the inattention of the counsel who drew it;

and the question now was, whether it could be amended *upon motion.*

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MARR'S Admr. *against* MILLER'S Exrs. and others.

Per Curiam. The practice of this court heretofore, and of the Federal court of this place, has been inquired into; and it appears that, in all cases, where, by *mistake*, an entry has been made, it has been rectified, upon motion; and, where any errour has been committed by the officers of the court, or gentlemen of the bar, it has been corrected in like manner.

Let the decree therefore be set aside; and be entered *now*, as it should have been.

GALLEGO *against* QUESNALL'S Admr.

Saturday, 28th March.

In this case, the injunction had been granted in 1794, and the question made by *George K. Taylor*, counsel for the defendant, was, whether, as the *injunction* was *dissolved*, at the last term of this court, the bill may not in this term, be dismissed, under the act of assembly passed 20th January 1804. (See Rev. Code. vol. 2. ch. 29. sect. 3.)

The act passed the 20th of Jany. 1804, concerning the dismission of bills of injunction in certain cases, does not apply to bills filed before that act took effect.

Per Curiam. Although the words of the act are, "that "in all cases where *hereafter* any *injunction* shall be "wholly *dissolved*, the bill of the complainant shall stand "dismissed of course, with costs, unless, at the next term, "sufficient cause shall be shown against it," yet the construction of this law should be confined to injunctions, awarded since the act; and should not be applied to those cases which were on the docket before; and such the court understands to have been the uniform course of the court since the passage of the law. Such too, was the construction given, by the court of appeals, to the act, of 1795, which authorized the assignee of a bond with a collateral condition to sue in his own name. See *Craig v. Craig*, 1 Call 483; and several cases since, in the same court, supporting the same principle. The bill must stand, and take its regular course upon *the docket.*

MAY TERM, 1807.

ANONYMOUS.

A sheriff's return of the service of a *Decree nisi*, or of any paper not directed to him in his *official* capacity, ought to be authenticated by affidavit.

In several cases, at the last term, Decrees *nisi* were entered up against the defendants for want of an appearance and answer: copies of which decrees were returned served by *deputy sheriffs*, (without affidavit of the service,) and were made the ground of a motion for final decrees. The only question was, as to the sufficiency of the notice.

Per Curiam. In all cases where a *sheriff* is bound to act in his *official* capacity, his return should be considered as evidence of the *act* unless the contrary be shown; but when he is called on to do that which any other person may do, and which he is not *by virtue of his office* bound to do, although he may do it, he does it as any other individual,—not as an officer: and therefore his return should not be regarded as any better evidence that the act has been performed by him, than a like return should be, if made by a *private* individual. In this case, if the copy of the decree had been served by a private individual, he would have to prove it, by his affidavit; and so must the sheriff,—because he acted in this case as an *individual*, and not as sheriff: he could not be punished for a *false return* of that which was not *directed* to him, and which he was of course not bound to receive; and, if he did receive it, he found in it no particular directions to him, more than to any one else. Whether, therefore, he or any other individual should return it, it must be accompanied by an affidavit.

Motion for a final decree, at present, denied: and the bar requested to take notice that the practice, upon this point, is now settled.

Friday, 1st May.

WILLIAMSON'S Admr. *against* APPLEBERRY.

An Injunction ought not to be granted on the ground that the plain-

On an appeal, brought up by petition, from the court of *Fluvanna* county.

An action of debt was instituted on the common law side of the court of *Fluvanna*, in the name of *John Wil-*

liamson Jr. against the appellee. After a judgment was obtained, the defendant at law filed a bill in equity praying an injunction to the judgment, on the ground that the plaintiff (*John Williamson* Jr.) was dead at the time of commencing the suit. To this bill there was a demurrer for want of equity. It having been discovered that *John Williamson* Jr. was in truth dead, the demurrer was withdrawn, and the administrator with his will annexed admitted a party defendant, who also filed a demurrer to the equity of the bill; which demurrer, on argument, was overruled.

Hening, in support of the petition for an appeal, stated that the county court ought not to have received the bill of injunction; and, having received it, ought to have sustained the demurrer.

It is clear that a court of equity had no jurisdiction over this case; it being a mere errour *in fact*, which ought to have been corrected by a writ of errour, *coram nobis*. (Lill. Abr. 704. pl. C. Imp. pract. K. B. 532—2 Saund. 101 a, Williams's notes.)

The impropriety of making a party a defendant, in the first instance, whom the complainant himself admitted to be dead, must be obvious. As no process of the court could reach the party who was dead, this irregularity imposed on his representative the necessity of being admitted a party, that there might be an end of the cause. But, in deciding the cause upon the demurrer, which was properly filed, the court ought to have sustained it.

tiff at law was dead before the judgment was obtained in his name. But this errour should be rectified by a writ of *errour coram nobis*.

If an injunction be granted in such case, the legal representative of the decedent may demur to the bill, and the demurrer ought to be sustained.

Decree of *Fluvanna* court, overruling the demurrer, reversed with costs.

On the first of January, 1807, PAUL CARRINGTON, *Esq. one of the Judges of the Supreme Court of Appeals, resigned his office; and inclosed his commission in the following letter addressed to the Governour:*

" Charlotte County, January 1st, 1807.

" SIR,

" Having served my country forty-two years without " intermission; twenty-nine of those years devoted to the " judiciary department; and being now in the seventy-fifth " year of my age; I think it time for me to retire from " publick business, to the exalted station of a private " citizen. Under this impression, I think proper to re- " sign my office of a Judge of the Court of Appeals. In- " closed is my commission, with a resignation annexed; " and I no longer consider myself a member of that ho- " nourable Court. This you will be pleased to communi- " cate to the honourable General Assembly now in session, " to whom my highest respects are tendered, with a well- " founded hope, that their honest labours may promote " the publick welfare.

" With my compliments and unfeigned respects to " that Honourable body, your aids and associates,

I am, most affectionately,

Your friend and fellow-citizen,

PAUL CARRINGTON.

" His Excellency
" William H. Cabell, Esq.
" Governour of Virginia, Richmond."

During this session of the legislature, an act passed declaring that the vacancy which had occurred by the resignation of *Paul Carrington, Esq.* of his office of Judge of the Court of Appeals, should not be supplied by the appointment of a successour: that the said court should hereafter consist of *four* Judges, any three of whom to constitute a court, till another vacancy should occur; after

which event the court should consist of *three* Judges, any two of whom should constitute a court.

The terms of the court were also altered.—Before the passing of this act, the Supreme Court of Appeals held two terms in the year; one commencing the 10th of *April*, the other the 10th of *October;* and were unlimited in their sessions. By the act of 1806, (chap. 22.— see also Rev. Code. vol. 2. chap. 102.) there are to be *three* terms, as follows, viz:

The	1st	to commence the	1st day of *Jan.* and continue	45	Juridical days.
	2nd	- - -	1st of *June* - - -	36	
	3d	- - -	5th of *October* - - -	45	

CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT OF APPEALS

OF

VIRGINIA.

IN THE THIRTY-FIRST, AND THIRTY-SECOND YEARS OF THE COMMONWEALTH.

Tuesday, 2d June. 1807.

CHESHIRE *against* ATKINSON.

In this case the following points were decided.

1. That an attachment would not lie from this court against a sheriff for proceeding to carry into effect an execution under a decree of a Superiour Court of Chancery, after an appeal had been granted in vacation* by the Judge of that court; (although the sheriff had notice of the appeal;) if such proceeding by him took place before the record was brought up; for it was said to be no contempt to this court, until the cause was depending therein.

The Court of Appeals will not award an Attachment against a sheriff for proceeding to carry into effect an execution under a Decree, from which an appeal has been granted by the Judge who pronounced it; although he had notice of the appeal; if such proceeding took place before the record was brought up.

2. That the act of the last session of Assembly, (1806, ch. 22. sect. 4.,) which declares that no appeal from a decree of a Superiour Court of Chancery, nor any writ of errour or supersedeas shall be granted by the Court of Appeals *in court* but only by a *Judge*, or by the *Judges* thereof during the term, or *in vacation*, was not meant to extend to such a supersedeas as is merely *auxiliary* to the proceedings of the court; for example, to stay the execution of a decree of a Superiour Court of Chancery; where an appeal had been granted in vacation, and no supersedeas had been awarded at the time.

Present Judges *Lyons*, *Fleming* and *Roane*.

* See revised Code, 1st vol. chap. 64. sect. 59. as to granting appeals in vacation.

Such a Supersedeas as is merely *auxiliary* to the proceedings of the court may be granted *in court*; notwithstanding the 4th sect. of the Act of 1806, concerning the Court of Appeals.

BUCHANAN *against* LEERIGHT.

Tuesday, June 2d.

This was an appeal from a decree of the Superiour Court of Chancery for the Staunton District.

The appellant, on the 1st of October 1796, executed a mortgage to the appellee to secure the payment of £1350; the proviso in which mortgage was in the usual form, that, if the mortgagor should pay to the mortgagee the said sum of money, "on or before the 1st of December "1800, or within sixty days thereafter, then &c." There was also a covenant on the part of the mortgagor to pay the said sum "on or before the day and year aforesaid," (*viz.* the 1st of December 1800) "or within sixty days "thereafter;" and a stipulation between the parties, that "provided the said sum of money shall be punctually "paid on or before the times stipulated and thereby "agreed on, that then and in that case *no interest shall* "*accrue or be charged thereon.*" There was no other expression in the mortgage which related to the payment of interest.

Interest is not to be allowed from a period antecedent to the time appointed for the payment of money, without an express stipulation to that effect; mere *implication* not being sufficient.

The decree of the Chancellor was, that unless the principal sum *with interest from the first day of October* 1796 (the date of the mortgage,) were paid on or before a certain day, then the mortgaged premises should be sold, &c. From this decree an appeal was taken to this court.

The counsel for the appellee may take up an appeal out of its turn on the Docket, as a *delay case*, and confess errour.

Hay for the appellee, moved to take up the cause out of its turn on the docket, as a delay case, it not presenting any point for argument. He admitted that there was no *express* stipulation for the payment of interest from the date of the mortgage; and if that was not *implied* by the subsequent argument of the parties, that in case the money was punctually paid *no interest should accrue or be charged thereon*, the decree was erroneous so far as it gave interest from the 1st of October 1796 (the date of the mortgage) to the the 1st of December 1800, (the time of payment.—)He was therefore willing, if the court should be of that opinion, to confess errour as to the interest antecedent to the 1st of December 1800, and take a decree for the principal and interest subsequent to that time;—which was ordered accordingly; that being such a decree as the Superiour Court of Chancery ought to have entered.

Present Judges *Lyons*, *Fleming*, *and Roane*.

JONES and others *against* HULL.

Tuesday, June 2d.

The sheriff's failing to make a return on an execution is no ground for reversing a judgment obtained on a forthcoming bond taken in pursuance thereof.

This was an appeal from a judgment rendered by the District court of *Hardy* on a forthcoming bond. The execution on which the forthcoming bond was founded, was recited in the record, but it did not appear that the sheriff had made any return thereon.

This omission at first created some difficulty. But it was observed that the law only directed the sheriff to return the forthcoming bond to the clerk's office from whence the execution issued, (Rev. Code. chap. 151, sect. 13, pa. 298.) *unless otherwise directed by the creditor;* (Rev. Code. chap. 249, sect. 5, pa. 390.) and that the creditor might even dispense with the necessity of the sheriff's noting on the execution how he had executed it, (Rev. Code. chap. 176, sect. 9, pa. 325.) In the present case the appellants not having opposed the award of execution upon the forthcoming bond, on any ground whatever, the presumption is that all the proceedings were regular, and that the forthcoming bond was in fact forfeited.—Judgment AFFIRMED.*

Present Judges *Lyons*, *Fleming*, and *Roane*.

* During this term, in the case of *Fisher* and others v. *Davis* (Monday June 15) all the Judges being present, the same point occurred. Judgment was in like manner affirmed.

ROBINSON'S Admr. *against* BROCK.

Wednesday, 31 June.

By a marriage settlement, certain slaves are conveyed in trust, for the use of the Husband and Wife for life, and for the life of the survivor; and after the deaths of

This was an action of detinue brought by the appellant against the appellee in the District court of *Fredericksburg* for the following slaves; to wit, *Reuben*, *Mordicai*, *Lisee*, *Nan*, *Gabriel*, *Lawson*, *Ben*, *Milly*, *Jane*, and *Jerry*. The declaration was in the common form; plea *non detinet*, and issue—The jury, who were sworn to try the issue, found a special verdict; that the testator of the plaintiff, on the 24th day of March 1788, being possessed of the slaves in the declaration mentioned as of his own proper goods and chattels, having previously intermarried with *Susanna Brock* the daughter of the defendant, executed a paper-writing purporting to be a deed; (which they find in *hæc verba;*) whereby he conveyed to *John Brock*

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ROBINSON'S Admr. *against* BROCK.

a tract of land in *Spotsylvania*, and the following slaves; to wit, *Jerry*, *Mordicai*, *Len*, *Pallis*, *Jesse*, *Alice*, *Tom*, *Cate*, *Hannah*, *Nan*, *Priscilla*, *Gabriel*, and *Lawson*, in trust, for the grantor and his wife for life, and for the life of the survivor; and, after their deaths, and the death of the survivor, for the use of the children of the marriage; or, if there was no child or children, then the lands and slaves which originally belonged to the said *Benjamin*, (except *Mordicai* and *Alice*,) to be held in trust for his heirs, or for such person as he should appoint and direct; and that *Nan*, *Priscilla*, *Gabriel*, *Lawson*, *Mordicai*, and *Alice*, with their increase, should be held in trust for the use of the heirs of the said *Susanna* his wife, or to be disposed of as she should appoint and direct;—which paper-writing they find to have been duly recorded:

That *John Brock* the trustee died before the institution of this suit, and that *Susanna* (the wife of the said *Benjamin Robinson* the testator of the plaintiff) died in the lifetime of her said husband without any child;—That *Benjamin Robinson* (the testator) after the death of his said wife, to wit, on the 19th of June 1794, being still possessed of the said slaves, made and executed a paper-writing, (which they find in *hæc verba*,) in which there is a recital that the said *Benjamin Robinson* had executed a deed of trust, &c.; by virtue of which deed the following slaves, to wit, *Nan*, *Priscilla*, *Gabriel*, *Lawson*, *Mordicai* and *Alice*, with their future increase, after the death of the said *Benjamin* and his wife the said *Susanna*, without issue (the same not being disposed of by her,) would descend to her father the said *Joseph Brock* or his heirs; and that she had died without issue; thereupon in consideration that the said *Joseph Brock* should release and give up all his right to *Alice* and to three of her children born after the deed made, and to some household furniture, and also in consideration of the sum of *five* shillings, the said *Benjamin* released and relinquished to the said *Joseph* his the said *Benjamin's* interest in *Mordicai*, *Nan*, *Priscilla*, *Gabriel*, *Lawson*, *Ben*, and *Milly*, which paper-writing is found in the said verdict to have been duly recorded; (though the certificate of the clerk states it to have been recorded on proof by one witness;) and that the slaves in the said paper-writing are a part of the slaves in the declaration mentioned.

They find that the said *Susanna* made no appointment or other disposition of the said slaves in the first writing mentioned. They find that the slaves in the declaration

both, for the use of the children of the marriage; and, if there be no child, a part of the said slaves for the use of the *heirs of the husband*, or of such person as *he* shall appoint and direct; and another part for the use of the *heirs of the wife*, or to be disposed of as *she* shall appoint and direct.—The wife dies, in the lifetime of the husband, without any child; and the husband dies having all the slaves in his possession; no appointment having been made. The heirs of the husband shall not take those conveyed to the use of the heirs of the wife; but they shall go to her next of kin.—

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ROBINSON'S Admr. *against* BROCK.

mentioned are the slaves named in the indenture aforesaid, dated the 24th March, 1788, or the increase of the females;—And that the said *Benjamin Robinson* departed this life, prior to the first of January, 1796, possessed of the said slaves; without any child; having duly made his testament and last will; dated the 11th day of August 1785, (which they find in *hæc verba;*) whereby, he devised some property to his sister, and the following slaves to his brother *Charles Carter Robinson;* (the plaintiff) to wit, *Reuben*, *Mordicai*, *Len*, *Lisee* and her increase; and every thing else in his possession after paying his debts;—That administration with the said will annexed was granted to the plaintiff by the proper court;—And that the defendant was in possession of the slaves in the declaration mentioned at the time of bringing the suit.—They also find that the said *Benjamin Robinson*, on the 3d of February 1792, executed a writing purporting to be a deed; (which they find in *hæc verba;*) in which it is stated that he (for the consideration of £42 8 11 theretofore advanced, and of some securityships entered into by *Joseph Brock* for him) bargained and sold to the said *Joseph Brock* four negroes, named *Reuben*, *Lisee*, *Hannah*, and *Johnston*, with their future increase, which deed they find had been duly recorded; and that *Lisee* and *Reuben* therein named are two of the slaves in the declaration mentioned;—That the defendant, previous to the marriage of the said *Benjamin* and *Susanna*, was possessed of the slaves *Nan*, *Priscilla*, *Gabriel*, and *Lawson*, and, between the 4th of December, 1787, and the 24th of March, 1788; and gave them to the said *Benjamin Robinson* as a part of his daughter's fortune.—If upon the whole matter, &c. they find for the plaintiff all the slaves; or, if the law be for him, only as to *Reuben*, *Lisee*, *Jane*, and *Jerry;* then, they find *them* for him with damages—But, if the law be for the defendant, then they find for *him*—The District Court gave judgment for the defendant; and from that judgment the plaintiff appealed to this court.

In such case, the trustee being dead, the heirs of the husband, or wife, may maintain an action of Detinue for the slaves conveyed to their use respectively.

In an action of Detinue for slaves, if the jury find a special verdict; and, as to some of the slaves, omit to state a circumstance, which is necessary to ascertain whether the plaintiff is entitled to them or not; the verdict is insufficient, and a *Venire de novo* ought to be awarded.

Williams, for the appellant, contended, 1st, that upon the death of *Mrs. Robinson*, without a child, all the slaves named in the deed of 1788, passed to the testator of the appellant. The deed provides that the trustee was to hold them for the use of *Robinson and his wife*, during their lives, and for the life of the survivor; and if she die without a child, then for the use of her *heirs*, or such person as she should appoint. She made no appointment,

and her husband having survived her, he is her *heir* as to personal estate; that is, he is the *distributee*. So, if he die, it shall go to his executor. (*a*)

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It is true that the husband surviving the wife, is not entitled to a *chose in action*, belonging to the wife, unless it is reduced into possession during the coverture. He can only be entitled as her administrator; but still he is not compellable, under our act of assembly to make distribution to any body. In *Sneed* and *Drummond* (*b*) and *Dade v. Alexander*, (*c*) the court seem to have sanctioned this doctrine. In one of those cases the husband had not taken administration on the effects of his wife, but nevertheless the court sustained his claim. Even in the case of *choses in action*, the representatives of the husband are entitled.

ROBINSON'S Admr. *against* BROCK.

(*a*) 1 Bac. Abr. 480, Gwil. edit.

(*b*) 2 Call 491.

(*c*) 1 Wash. 30.

The term *heir* as applying to personal estate must necessarily mean the *distributee*. He considered the case of *Wallace and wife v. Taliaferro and wife*, (*d*) as decisive of the question, that slaves are personal estate, and, as it respects the estate of the wife, subject to the same rules as *choses in action*.

(*d*) 2 Call 447.

Judge TUCKER—Does not the *trust estate* create a difference?—Did not the trustee hold for the benefit of the *cestuique trust?*

Williams. The trustee was to hold for the *use* of the *heir* of *Mrs. Robinson*, in the event of her dying without issue; and if this argument be correct, the estate must go to the *husband*, or his representatives. The deed does not say to the *father*, *brother*, &c. but to the *heir*.(*e*)

(*e*) See 7 Bac. Abr. 186. Gwil. edit.

He contended, 2dly, that nothing passed by the deeds of 1792 and 1794. The conveyance of 1794 was upon condition that the father of *Mrs. Robinson* should release to the testator of the appellant certain slaves. Until that was done, nothing passed particularly as there was no delivery, and the consideration was merely nominal, being the sum of five shillings.(*f*) The deed of 1792, stating the consideration to have been as an indemnity for some securityships entered into by *Brock* for *Robinson* the testator of the appellant, it cannot be presumed that *Robinson* meant to part with his estate farther than was necessary to effect that object. Unless it be proved that those debts were paid by *Brock*, he acquired no absolute title to the slaves under the deed. The jury expressly find that *Robinson* continued in possession of

(*f*) Dyer 29. b.—1 Salk. 118. 7 Term Rep. 125.

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them till his death, and *Brock's* getting possession after the death of *Robinson* cannot better his title.(*g*)

3dly. That *Robinson* had no power to dispose of the slaves, but under such an appointment as was contemplated by the indenture of 1788; which neither of the papers (found by the jury) are.

But if all the other points should be against him, he insisted that there must be a judgment for *Jane* and *Jerry*, because it does not appear that they were ever parted with by the testator of the appellant. They are not contained in any of the deeds. The jury find that he was possessed of them, and it does not appear from any finding in the cause, that he ever disposed of them.

With respect to the difficulty (suggested by one of the Judges) of severing the damages as to two of the negroes; (in the event that the court should be of opinion the appellant was entitled to them;) he supposed it might easily be obviated by awarding a writ of inquiry. This might have been done, even if the jury had found no damages. The jury having submitted the whole case, it is competent to the court to decide on a particular part of it. The court may affirm the *right* as to the two negroes, and award a writ of inquiry as to the damages; on the same principle that they may award a writ of inquiry, if the jury in an action of detinue, omit price or value;—which, in that case, is expressly authorized by law.

(*g*) See 7 Term Rep. 440—445.—3 East 93.—6 East 614.—7 Term Rep. 725.

Botts, for the appellee. The deed of 1788 having vested the legal estate in the slaves, in *John Brock* and his heirs, neither the appellant nor his testator could recover them in an *action at law*. In the action for money had and received, although, the plaintiff recovers on the ground that he is entitled in *conscience*, yet he must have a *legal* right. So, in ejectment, where there is an outstanding term in *cestuique trust*, the court will instruct the jury to presume a surrender. In no other case can an equitable title be asserted in a court of law. In this case, the trust was not executed, but devolved upon the trustee and his heirs.

The provisions of this deed extend beyond the life of the wife; and it appears to have been the obvious intention of the parties that the property should be distributed among her relations. The deed of 1794 declares this to be the true exposition of the deed of 1788; and, being an instrument of as high dignity, might even have been admitted to explain it, if it were ambiguous. Suppose, instead of a separate deed, an endorsement had been made on the

original, it certainly would have been considered as valid as a part of the deed itself.

The husband, as such, never had *possession*,—*that* was in the trustee. In *Wallace v. Taliaferro* it was decided that the husband held in his *fiduciary*, not his *individual* character. If then, the testator of the appellant was neither possessed in right of his wife, nor took administration on her estate, he cannot recover.

The deed of 1792 conveyed all the right of *Robinson*, in the slaves therein named. It is objected, however, that it was given merely as an indemnification, for some security-ships and an advance of money. The deed is absolute and explicit; and, if not sufficient in itself, no argument can make it so. It is also objected, that the consideration in the deed of 1794 is insufficient to pass any estate. If the deed could be impeached, at all, it must be in a court of *equity;* not *at law*.

With respect to the slaves, *Jane* and *Jerry*, the jury find that they are the increase of the females named in the indenture of 1788; and, in the concluding part of the special verdict, they are placed in the same class with two others specially named in that indenture.

But if the appellant could succeed as to *Jane* and *Jerry*, no judgment, severing the £100 damages, could be given. It is argued that a writ of inquiry, as to them, may be awarded;—and this is inferred from the act of assembly, which authorizes it in a particular case. It is admitted that, without the aid of the statute, it cannot be done. On what principle can the court extend the provisions of a law further than the legislature has done?

Williams, in reply. The trustee, in this case, was a mere nominal person. On the death of the husband and wife the trust was executed. During the life of the husband, he having survived his wife, the trustee held for him, and, after his death, the estate devolved upon his representative.

The deed of 1794 does not change the provisions of that of 1788. The grantor, in the former, speaks of the operation of the latter, merely as a legal deduction; in which he was mistaken.

There is no weight in the objection that the husband did not administer on the estate of the wife; for, being in possession, and not bound to make distribution, it would have been a nugatory act to take administration.

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It is said that the deed of 1792 conveys *absolutely*. But *Robinson* having remained constantly in possession from 1788; and it not having been found that *Brock* paid any part of the consideration for which the deed of 1792 was executed; it can only be considered as a mortgage.

As to *Jane* and *Jerry*, there can be no doubt of the right of the appellant.—If he was entitled to recover them, the District Court erred, in giving judgment for the defendant: and, if this court do not admit my exposition of the statute, and award *a writ of inquiry*, they must direct a *venire facias de novo*.

Curia advisare vult.

Thursday, June 18th, the Judges delivered their opinions.

Judge TUCKER. The special verdict found in this cause, presents the following case:

Benjamin Robinson, (being then probably single) on the 11th day of August, 1785, made his last will, whereby he devised some property to his sister, and the rest of his estate to his brother *Charles Carter Robinson* (the plaintiff below): he died in January, 1796. Having, between the time of making his will and his death, that is in December, 1787, intermarried with *Susanna* the daughter of *Joseph Brock* on whom he made a settlement, before marriage;—but, some of the negroes intended to be comprised in it, being omitted; he, on the 24th of March, 1788, executed an indenture of trust (in which his wife *Susanna* is named as a party, but does not appear to have executed it) to *John Brock;* for the purpose of complying with his marriage-contract, and that a competent jointure might be settled on his wife; (in lieu of dower, and in consideration of the fortune received by her;) whereby he conveyed to the trustee and his heirs a tract of land, and sundry negroes, (including four received from the defendant with his wife) to the use of himself and his wife, and the survivor of them, for life, without impeachment of waste; and thereafter, to the use of the child or children of the marriage; and, if no child, then the land and slaves which originally belonged to the husband (except *Mordicai* and *Alice*) to be held in trust for his heirs, or to be disposed of as he should *appoint* and *direct;* and that *Nan*, *Priscilla*, *Gabriel*, *Lawson*, *Mordicai* and *Alice*, with their future increase should be held forever in trust, for the use of the heirs of the wife, or to be disposed of as she shall appoint and direct.—She died in the lifetime of

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her husband; without any child, and without making any appointment. The jury find that the slaves in the declaration mentioned "are the slaves named in that indenture, or the increase of the females therein also named;" and that *Benjamin Robinson* died in 1796, possessed of them.

They find that on the 3d of February, 1792, *Benjamin Robinson* executed an instrument under his hand and seal, whereby, in consideration of £42 8 11 by *Joseph Brock* (the defendant I presume) before paid and advanced for him, and of certain pecuniary engagements for him, he granted, bargained, and sold to him four negroes, *Reuben*, *Lisee*, and two others, with their future increase, with a clause of warranty.—This instrument was executed in the presence of one witness, only, by whom it was proved, and admitted to record, in April, 1792. *Reuben* and *Lisee* are mentioned in the declaration

They find that *Benjamin Robinson*, after the death of his wife, *viz.* on the 19th of June, 1794, being still possessed of the slaves, executed a writing under his hand and seal, in the presence of two witnesses, one of whom only proved the same, upon which it was admitted to record; wherein it is recited that he executed the first mentioned deed of trust, and that, in the said deed, among other things, the following negroes, *Nan*, *Priscilla*, *Gabriel*, *Lawson*, *Mordicai* and *Alice*, with their future increase, were to be held in trust, for the use and benefit of himself, and his wife, during their lives, or the survivor of them, and after their deaths, without issue, on being disposed of by her (she being since dead) they will descend to her father *Joseph Brock*, (the defendant,) and that, on consideration that the said *Joseph* SHALL release and give up all his right to *Alice*, and her three children born after the deed was made, and for the further consideration of the said *Joseph* giving up other things of the value of £30 and of five shillings in hand paid, the said *Benjamin* doth thereby *release* and relinquish to the said *Joseph* all his right, title, and interest in *Mordicai*, *Nan*, *Priscilla*, *Lawson*, *Ben*, and *Milly*.

They find that between the 4th of December, 1787, and the 24th of March, 1788, *Joseph Brock*, the defendant, was possessed of the slaves, *Nan*, *Priscilla*, *Gabriel*, and *Lawson*, as of his own property, and gave them to *Benjamin Robinson* as part of his daughter's fortune.

If upon the whole matter the court shall be of opinion for the plaintiff, they find for him all the slaves, &c. and damages. But if the court shall be of opinion that the

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plaintiff is entitled only to *Reuben*, *Lisee*, *Jane*, and *Jerry*, they find them for the plaintiff, or their respective values, &c. and £100 damages. The plaintiff is administrator of *B. Robinson* with the will annexed. The court gave judgment in favour of the defendant, and the plaintiff appealed to this court.

The counsel for the appellant contended:

1. That, upon the death of *Mrs. Robinson* without a child, all the slaves named in the deed of March, 1788, vested in *B. Robinson*, the husband—as well those which were to go to the *heirs* of the wife, as the others, he being entitled thereto *jure marito*, as being personal estate.

2d. That nothing passed by the deed of 1794, to *Joseph Brock;* the conveying being founded upon a consideration of his releasing, &c.; which he is *not found to have done.*

3d. That *B. Robinson's* having always continued in possession of the slaves until his death is a proof that nothing was intended or did pass by the deeds to *Joseph Brock;* no delivery being found.

4th. That, although the slaves, named in the deeds of June, 1794, and February, 1792, should have passed thereby, yet the appellant ought to recover *Jane* and *Jerry.*

The counsel for the appellee, on the other hand, contends that the *legal* estate in the slaves being vested in *John Brock* and his heirs, by the deed of March, 1788, disabled the appellant or his testator from recovering them in an action at law.

As this may be deemed a previous question in this case, I shall consider it first.

It is a general proposition that trusts are a creature of equity; and, where the object of a suit is to enforce the performance of a trust by the trustee himself, or his heirs, courts of equity seem to have claimed an exclusive jurisdiction, founded upon the confidence reposed in the trustee by the party creating the trust, and the fraud, default, or misconduct of the trustee himself. But, where the injury complained of does not proceed from the fraud or default of the trustee, and is of such a nature as that a court of law can administer the remedy, I have supposed it no objection to the jurisdiction of the latter, that the title of the plaintiff is an equitable, instead of a legal one. Thus, if a tenant for life were to do such an act as would amount to a forfeiture of his estate in lands held by another as trustee in fee simple to his use, with remainder to the use of a third person and his heirs, I should imagine the remainder-man might maintain an ejectment, on a

demise laid in *his own* name instead of that of the *trustee, or his heirs:* for, if he could not, it might often happen, (in this country at least,) that, for want of knowing the names of the persons in whom the legal title was vested, the *cestui que use* in remainder could never obtain possession of the lands, notwithstanding any act of forfeiture by, or even, the death of, the tenant for life. In like manner, I should suppose the *cestui que use* of a slave might bring an action of trespass or trover against any person who should take the slave out of his possession;—and I can see no reason why he might not, in the same case, maintain an action of detinue in his own name. I am therefore not prepared to say (as a general proposition) that the *cestui que use* of a slave cannot maintain an action of detinue in his *own name;* but must sue in the name of his *trustee, or his heirs*, to whose names and persons, under the operation of our present law of descents, he might be perfectly a stranger in the course of a very few years. I shall, therefore, proceed to consider this cause on its merits.

The plaintiff below founds his right of supporting this action upon the administration, with the will of *Benjamin Robinson* annexed, granted to him by a court of competent jurisdiction. I shall make two remarks upon this will:—First, that as it bears date prior to the deed of 1788, that deed operates as a revocation of the will, as to the lands and slaves therein comprised.—Secondly, that as it contains a legacy to his sister ————, it creates a presumption (not removed by any thing contained in the special verdict), that he left a sister, as well as a brother (the plaintiff) to inherit his estate; to whom, as his heirs, the fee simple in the lands and slaves mentioned in the deed, and which, in the events which have happened, were to go, (unless otherwise disposed of by him) by the express provisions in the deed. And since the object of the suit is not only to recover the slave limited to the wife and her heirs, but those also which were limited to the husband and his heirs, I should conceive that the sister also ought to have been a party to the suit for the recovery. For I conceive the trust estate not to have been spent at the death of *Benjamin Robinson*, the husband, for reasons which will appear hereafter; but that the same was continued after his death with the new uses, annexed thereto; the performance of which in favour of the several *cestuis que use* it belonged to a court

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of equity to enforce, in behalf of the respective heirs of the husband and wife.

By the act of 1727, c. 4. sect. 12, it is enacted that any slaves, settled, conveyed, or devised, with the same limitations, and in the same deed, or will, with land, shall be considered as annexed to, and shall descend and pass with it, from time to time, in possession, reversion, and remainder; with a proviso that such slaves should be liable for any debts of the tenant in *tail* for the time being. If *Benjamin Robinson* made no disposition of them, under the power given him by the settlement in 1788, they consequently descended with the land to his *heirs*, who were entitled to claim them, as such, *under the deed*, without the assent of the executor or administrator, and without his *aid* in *recovering them*. For not being liable, as I incline to think, for *Benjamin Robinson's* debts, (he being only tenant *for life* of the *use* of them,) in case there had been any children of the marriage, to whom they must have gone, without incumbrance, under the limitations in the deed of 1788, and there being no revocation of the trust upon the death of *Mrs. Robinson* without issue; but on the contrary the trust being declared to be perpetual, for the use of the *Heirs* of both the husband and wife; I am strongly inclined to think that the *executor* or *administrator* of *Benjamin Robinson* could have no right to sue for the slaves limited by the deed of 1788 to HIS heirs.—This would, of itself, be sufficient to decide the fate of the present suit, which is brought for the recovery of other slaves, as well as those limited to the *heirs of the wife;* since it nowhere appears that *Charles Carter Robinson* (the plaintiff) is sole *heir*, as well as *devisee* and *administrator*, with the will annexed, in which character he now sues. The will (being antecedent to the deed of settlement in 1788) cannot operate as an appointment under the deed; or, if it could, then the bequest of *Jerry* and *Pallas* to the sister would defeat the claim of the brother to *them*, under that appointment. For in that case the sister would derive her title from the *deed*, and not from the will: and therefore the executor could have no right to sue for what she would claim independent of his assent, and, with the aid of a court of equity, enforce without his concurrence.

I might here conclude my opinion upon the present verdict. But as it is possible that the plaintiff *C. C. Robinson* may unite in himself the character of sole *heir* of his brother, as well as that of administrator, and as I conceive

enough appears upon the face of this special verdict to enable me to decide the whole matter in controversy, I shall proceed somewhat further. JUNE, 1807.

By the settlement in 1788, the whole property therein comprised was conveyed to a trustee in fee, to the use of the husband and wife for their *joint* lives, with remainder to the *survivor* for life, and thereafter to the children of the marriage: and, if there should be no child, the remainder of the lands, and certain slaves were to go to the heirs of the husband (unless disposed of by *him*) and, of the residue of the slaves, the remainder was declared to vest in the *heirs* of the wife, if not otherwise disposed of by *her*. ROBINSON's Admr. *against* BROCK.

Here it may be proper to observe, that, on the death of the survivor a *new use*, different from the first, was created; by which *new* use, the joint property was thereafter to be divided, and to descend separately; the lands and one part of the slaves to go in one channel; the remainder of the slaves in a different channel. This *new* use could not take effect until the death of the survivor without any children of the marriage, without making any appointment. By severing the wife's slaves, with two others, from the lands, which with the other slaves were to descend to the heirs of the husband, it was manifestly the intent of the parties that they should go to different persons.

Neither husband nor wife had any more than an estate for *life*, with power to appoint, as to the respective parts of the property, intended to go to their heirs RESPECTIVELY. I say *respectively*, because it is impossible to read the deed, without understanding it in that manner. The husband never was possessed of any of the slaves in *right of his wife*, after the settlement, by which he devested himself of the property which he acquired therein as a part of her fortune; his possession thereafter was under the deed of settlement, consequently his *marital* rights were from that period *totally suspended*, as long as he lived. If the rule that deeds shall be construed according to the intention of the makers, so far as they may be consistent with the rules of law, be a sound rule of interpretation; and if it be true that every man may waive the benefit of any law in his favour, I would ask, whether we can hesitate to pronounce that the intention of the parties—(the husband as well as the wife) was that the slaves limited to *her heirs*, after the death of the survivor, should NOT go to HIS; and whether, if such was their mutual intention, we

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ought to defeat it by a forced construction of the meaning of the word *heirs*:—A word whose technical sense cannot, I conceive, be ascribed to *marital* rights; the husband, in no sense that I have ever understood it, being *heir* to the wife, except in a single case provided for in our law of descents, to which the present bears no resemblance. The question here is not *who* is the wife's heir; but whether the *husband* is. His *marital* rights extend to every personal thing of which she was possessed, or he possesses himself, during the coverture; and, in the event of surviving her, *his* right to administer upon her personal property not reduced to possession, supersedes all others; and the law protects him from distributing it when recovered.

But this right, I conceive, he has given up, in the present case, by the settlement; and the wife, as to the slaves reserved to her heirs, was to be regarded as a *feme sole*. But, as her *heir*, he can claim nothing, unless indeed she shall not have left a single relation in the world; and that, only under the express provision of our law of descents. The description of next of *kin of the wife* can, in no respect, apply to the husband: he is entitled to the personal property of his wife *jure mariti*, 3 Ves. jr. 246, 247. The case is perfectly parallel, where the person to succeed to the personal estate of the wife is described as her heir. He cannot be entitled under that description. But it was urged at the bar that the husband being found to have died possessed of the slaves, his executor had no occasion to administer upon the *wife's* estates, in order to maintain a suit for the recovery of her property in action; because, where the husband is in possession of the property of the wife, he is not obliged to administer upon her estate.

Neither the fact, nor the conclusion drawn from it appears to me to apply to the principle of law there relied on. I have said the husband (after the deed of settlement was made) never was possessed of the slaves, as *husband*, but as *cestui que use* under the deed: and, as a trust estate and a legal estate cannot be united, (as was decided in the case of *Roy v. Garnett*, 2 Wash. 9.) his rights under the deed of settlement interposed between his marital rights and the possession acquired under the deed of settlement, so as to prohibit their union, altogether; and, since his possession was never *as husband*, no right *as husband*, could, I apprehend, be transmitted to his executor, or administrator in virtue of that possession. His representatives, therefore, must resort to the same course which the

husband himself must have pursued to recover the slaves or other property of his deceased wife, which he had never reduced to his legal possession;—by taking out letters of administration on *her* estate.

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We now come to that point of the cause upon which the appellant's counsel seemed to rely with great confidence: the operation of the deeds of 1792 and 1794 to *Joseph Brock* from *Benjamin Robinson*.

The consideration, mentioned in the former to *Joseph Brock*, being for money before paid and advanced, there is no doubt that *at law* it was good and valid; and since this is not a question between the creditors of *Benjamin Robinson* and his vendee, the remaining in possession (especially as the deed was made a record in due time) is of no importance whatsoever. Whether intended as a mortgage or not, is a question for a court of equity. And if the plaintiff had brought his suit in equity as under all the circumstances of this case, I think he ought, no doubt that the court would have made such a decree, as a due consideration of that question would have required.

The consideration for the second deed, seems, in part to be founded on the primitive intention of the parties to the deed of settlement in 1788; and for the purpose of explaining the same; together with some beneficial concessions from *Joseph Brock* to *Benjamin Robinson;* as well as five shillings paid in hand; a circumstance which I conceive sufficient to establish a *legal* consideration, executed on the part of *Joseph Brock;* and there cannot, I presume, be a doubt that a court of equity would enforce the performance of the covenant, on his part, to execute the release as to *Alice* and her three children; which is the only *executory* part of the deed.

But there is another point of view in which both these deeds may be considered, which leaves no room for doubt in my mind. By the deed of settlement of 1788, a power of *appointment* is reserved to *Benjamin Robinson*, as to the lands and slaves which, in the events which have happened, were to descend to his heirs. These deeds as to those slaves, are a good and effectual *appointment* under that power. And, with respect to those which were to descend to the *heirs* of the *wife*, if, under that provision, he had any claim or title to them, I conceive it to have been completely released and transferred by the deed executed to the defendant in 1794. Upon every ground, therefore, I am of opinion that the judgment should be affirmed.

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I have omitted saying any thing on the point of severing the damages, conceiving it to be perfectly out of the question. If the fact be that *Charles C. Robinson*, unites in himself the character of *sole* heir to *Benjamin Robinson* as well as his administrator; might it not be proper to award a *venire de novo*, in order that the title to *Jane* and *Jerry*, noticed by *Mr. Williams* in his argument, may be more satisfactorily explained, than in the present verdict? to which it may be answered: The judgment in this suit cannot operate as a bar to the plaintiff's recovery of those slaves (if entitled to them) under the limitations in the deed of settlement. I therefore conceive no *venire de novo* should be awarded—but the judgment be affirmed *in toto*.

Judge ROANE. The slaves mentioned in the declaration, fall under the several following classes: *viz.*—*Mordicai*, *Lawson*, *Gabriel*, and *Nan*, are the survivors of those limited to the wife of *B. Robinson* and her heirs by the deed of March 1788:—*Reuben* and *Lisee* were conveyed to *Joseph Brock* by the deed of 1792:—*Ben* and *Milly* were conveyed to him (together with *Mordicai*, *Nan*, *Gabriel*, and *Lawson*,) by the deed of June, 1794; and *Jane* and *Jerry* (who complete the number sued for) are alleged to be sufficiently found by the appellee, by that part of the verdict, which states "that the slaves in "the declaration mentioned, are the slaves named in the "indenture of the 24th of March, 1788, or the increase "of the females therein also named."

It is not found, however, (although extremely important in this case,) whether *Jane* and *Jerry* were descended from the female slaves limited to the *wife*, or those limited to the *husband* by the deed of 1788; nor is it found that *Jerry* was *so* descended; on the contrary it appears that a slave named *Jerry* is limited by the deed of 1788 to the husband and his heirs, and it does not appear that any slave of this name has been duly conveyed to the appellee.

I have been thus particular in the classification of the slaves, because it is evident that they severally fall within distinct points of consideration.

As to the first class, above stated, they bring us to the construction of the deed of 1788; and it is necessary to decide, whether, in the events which have happened, the appellee (the father and heir of the wife) or the intestate of the appellant (her husband who survived her,) is enti-

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tled to the slaves comprehended in this class. I am of opinion that, upon the true construction of that deed, a limitation to the husband longer than for his life was not contemplated; although in general, a husband surviving his wife and becoming her administrator is not bound to distribute her personal goods. In the event of her surviving him, in the case before us, the father would clearly succeed as her heir: and in the contrary event, the husband was entitled to hold her share as *survivor*, during his life, by the very terms of the deed; a provision which would have been wholly unnecessary, if the present pretensions of the appellant are correct. His right to her slaves, stipulated by the deed, in the event of his surviving her, forestalled and waived, as to the slaves in question, his *general* right as a husband to hold the personal goods of his wife dying in his lifetime, without account; and, taken in connexion with other circumstances apparent on the deed;—(such as her right to *dispose of*, and *appoint her* slaves to whomsoever she pleased,)—shows evidently the intention to be, that, *quoad* the slaves in question, she was to be considered as a feme sole; and imports a renunciation of the marital rights of her husband touching the same. In the event of a total failure of children, the negroes were to go respectively into the several *families* of the husband and wife:—it is a strong circumstance showing this, that four, out of six, of the slaves limited to the wife, were received with her as her portion; and the other two might have been added, in consideration of other articles of property also received with the wife. As to the first class of slaves abovementioned, therefore, the title is with the appellee, under the deed of 1788.

With respect to the slaves *Reuben*, and *Lisee*, and *Ben*, and *Milly*, they passed under the deeds of 1792, and 1794. In both those deeds a *money consideration* is expressed to have been received in part; and, therefore, as the appellee is also found to have been in possession thereof, his title at law seems complete. With respect to the negro *Jane* the verdict is too uncertain for us to act upon it. If she were descended from a female slave limited to the *wife* by the deed of 1788, she is the property of the appellee; but if from one limited to the *husband*, she is the property of the appellant. As to *Jerry*, we must either take it that he is the same slave who is limited to the *husband* by the deed of 1788, (which, though perhaps the better opinion, we ought not to presume on a special ver-

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dict,) or, if descended from one of the *female* slaves, he stands in the same doubtful predicament, as to his descent, as I have already stated to exist in the case of *Jane*. A *venire facias de novo* ought to go as to those slaves, and *then* the difficulty may be corrected as to the apportionment of the £100 damages; I should, (as at present advised,) feel a difficulty in making this severance, if a *venire de novo* were not awarded.

With respect to the objection to the action *at law*, in this case, in consequence of the *legal* estate being alleged to be in the trustees, under the deed of 1788, I think the position of the appellant's counsel "that on the death of the husband and wife without children the trust was executed," is correct. But, if it were not, still upon the principles and reasoning in some of the English cases, I think the objection ought not to prevail in this case.—For example, in the case of *Goodtitle* on the demise of *Hart v. Knot*, (Cowp. 43,) it is said, (page 46,) "that it has "often been determined that an estate in trust, merely "for the benefit of the *cestui que trust*, shall not be set up "against him; any thing shall rather be presumed: nor "shall a man defend himself, by any estate, which makes "part of the title of the lessor of the plaintiff." It is said, however, that, being now on a special verdict, we can presume nothing. Agreed: but, as it is not *negatively* stated, that there was in this case no surrender; and as such a one *may* actually have existed; the objection, in this case, (if there was any thing in it,) would perhaps justify the court, rather than overrule the action on this ground, to award a *venire de novo* for the purpose of having the case made more complete.

With respect, (more particularly,) to the interest limited to the husband: (and the same in relation to that of the wife,) by the deed of 1788,—I consider it as a limitation to him for life of the land and slaves in his own share:—remainder to his heirs; and that the interposing of eventual and particular estates, between these limitations, does not prevent their union in the husband, so as to give him an absolute title; subject, however, to the chance of survivorship on the part of his wife, and to the contingency of their having children. I understand it to be a rule, that whatever words would give, in the disposition of real estate, an express estate tail, and, *a fortiori*, a fee simple, will, in the disposition of personal goods, carry the whole interest, (2 Fonb. 81, and the cases there cited;)—and I see no necessity for construing the limita-

tions in question otherwise than if the estates limited to the husband and wife, respectively, had been by separate and distinct deeds or clauses. The giving the husband, in case of his surviving his wife, an additional right for his life in *her* slaves (and *vice versa*) cannot vary the true construction of the interests limited to him, as to his own slaves, although, (possibly, for brevity and convenience,) the two limitations may seem consolidated in one clause. As to the idea of the slaves being annexed to, and descending with the land, under the act of 1727, however that act might apply in this case, (as to which I give no opinion,) yet clearly, this condition can only exist during the existence of the particular estate for life or lives.—It can never exist after the interest has become entirely absolute, and all the intercepting estates are, either extinct, or have never taken place.

Under every view of this case, however, I am of opinion that a *venire facias de novo* ought to be awarded, for the purposes abovementioned.

Judge FLEMING. The counsel for the appellant, in this cause, has stated five different grounds, on which the judgment of the District Court ought to be reversed.

1st. That, by the deed of 1788, *Mrs. Robinson* having died in the lifetime of her husband, he became entitled to all the slaves in that deed named, to one moiety under the deed, and the other as heir to his wife.

2nd. That nothing passed to the defendant by the deed of 1794; the conveyance being in consideration of his conveying *Alice* and her three children, which it doth not appear he hath done.

3d. That nothing passed by the deed of 1792, as *Robinson* continued in possession of the slaves till his death, in 1795.

4th. Because he had no power to dispose of the slaves under such appointment as was contemplated by the indenture of 1788, which neither of the papers are: and,

5th. If all the other points are against the appellant, he ought to have judgment for *Jane* and *Jerry*.

With respect to the first point, let us consider the *nature* of the deed, and the true objects and intentions of the parties to it.

Although it was executed after the marriage between *Benjamin Robinson* (the intestate of the appellant) and *Susanna Brock* took effect, yet it was, as stated in the deed itself, the consummation of a contract that existed

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With respect to *Jerry*, he being named in the deed of 1788, and not being in the class allotted to *Susanna*, and to her heirs, in case of her dying without issue, and without disposing of them, it seems to me that the right to him is in the appellant, for the recovery of whom he might well maintain an action, as administrator of *Benjamin Robinson*, but, with respect to *Jane*, she is not I believe mentioned in the record, except in the declaration and verdict which seems imperfect and unsatisfactory in this, that it finds "that the slaves in the declaration mentioned, are the slaves named in the indenture of 1788, "*or the increase of the females therein also named;*" but doth not distinguish whether the said *increase*, or any, and what part of it, be of the class allotted to the said *Susanna*, or of that retained in the family of the said *Benjamin Robinson;* and how the appellant's title to *Jane* accrues I am at a loss to discover; I am therefore of opinion that a *venire de novo* ought to be awarded.

Judge LYONS. I have not formed any certain opinion, but, as three Judges have concurred, my declaring one positively is of no consequence in determining the cause. I conceive it therefore unnecessary to delay the decision by the court; but, as I had some doubts respecting it, I will mention them; supposing, however, that in some of them I must be in an errour; since three Judges differ from me, and give a decided opinion.

The law, I conceived, was well settled, that, where an estate was given to A. for life with a remainder to his *heirs general;* or with a power to give or appoint to others at pleasure, and no limitation over, (for want of appointment,) to any but *heirs general*, an absolute estate in fee vested in A.; especially in a *chattel;* and that it made no difference whether a use only was so given, or a legal estate;—for a trust is a creature of equity, and governed by the same rules *in equity*, as a legal estate is *at law;* it being the maxim in such cases that *equitas sequitur legem.* 2 Chan. Cases 64. 2 Ventr. 350.—1 Fonb. 146—7—8—1 Chan. Cases 265. 1 Fonb. 302—3—4.

Again; it is a rule of law that a *Term* (which is a *chattel-real*,) given to one and *his heirs* shall, nevertheless, go to his executors (1 Vern. 163.); and another rule, that an estate for life is merged in a remainder in fee, as soon as both are united in the same person.

In this case slaves were conveyed to *John Brock*, in trust for the use of *Robinson* and *wife*, for their joint

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lives, and the life of the survivor; as a jointure to her in lieu of dower, &c.; and, after their deaths, in trust for the children of the marriage, &c.; but, if there should be no such child, then, certain slaves for the use of the heirs of the *husband*, or for the use of such person as he should direct and appoint, and other slaves for the use of the *heirs* of the *wife*, (not saying her *next a-kin*) or to be disposed of as she should appoint, &c. The wife died in the life-time of the husband without any child, and without having made any appointment or disposition of the slaves;—and the question is, who is entitled to them?—

The husband is the legal heir, or representative of the wife as to her personal estate, which vests in him, immediately on her death, as her administrator, without account or distribution.—If in possession, he need not administer; but, if not in possession, he has a right to administer; and the right is said in 1 Wils. 169, to be transmissible to his executors; but the correctness of the last position appears to me to be doubtful.

Money ordered to be settled on the wife belongs to the husband, 1 Fonb. 103. 313.—But the trust in this case continued for the life of the husband, and to his heirs forever; so that he had no *legal* estate in what was limited to his heirs and appointees, after the death of his wife or during his own life, &c. That trust was surely useless; inserted merely *currente calamo;* and should be rejected as idle, and answering no purpose after the death of the wife. See *Parkhurst* v. *Smith*, Willes 327.

But it is said, "the husband by the deed gave up all his *marital* rights, and she held as a feme sole; as in the case of *Shermer* and *Shermer*. 1 Wash. 266."

In that case the wife (*who survived*) held an estate for life under her husband's will; with a remainder to whomever she should think proper to make her heirs; which gave her a fee or absolute property, in the same manner as if devised to her and her heirs; and, of course, her own relations took the estate: but, is that in any thing like the present case, where the *husband* survived?—Suppose the estate had been given or devised to her by a third person, or even her father, in the same words, and the husband had survived; would he not have taken the personal estate as her administrator?—If a husband agrees that his wife may dispose of her personal chattels by deed or will, and she does neither; does it bar or deprive him of his legal right to them as survivor and administrator, when there is no special limitation over (in default of her appointment,) other than to *heirs general*, not saying of

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her own kindred? I do not recollect to have heard it disputed before that the answer to this question should be in the negative. See 1 Fonb. 443.

I conceive that, after the death of the wife in the life-time of the husband, without child or appointment, the trust was at an end, as useless; and, surely, all his own part of the slaves, or the slaves settled on himself, were then liable to his debts, as his own absolute property; the trust being at an end *as to his part*, even if it continued *on his wife's part* to preserve it for her heirs at his death. Can a man convey slaves to trustees for the use of himself for life, with a remainder to his own heirs or appointees forever, to protect them from his creditors, and to defeat those creditors of their just claims?—On the death of the wife without child, the estate for life, (in his own share of the slaves, at least,) was merged in the remainder to his own heirs, and he had a fee or entire property in them: the future trust therefore, as to him was useless and void; the creditors would, in law and equity, stand in the place of appointees; and so would his executors. Willes, 327. 2 Chan. Cases 68. 78.

The deed of 1794, being made on condition that *Brock* released his right to *Alice*, (which he never did,) I consider as void: but that of 1792, for the slaves *Reuben*, *Lisee*, *Hannah* and *Johnston*, may be sufficient to convey them, as a good consideration is expressed in it; and, although *Robinson* retained possession until his death in 1796, the Act of Limitations did not operate on the possession; unless his administrator retained them afterwards; and that is not found in the verdict.—As, according to my present conception, (which I do not mean as conclusive,) the heirs of *Robinson* took nothing under the deed of trust of 1788, his brother and sister could only take as legatees under the will, and not as heirs or appointees under that deed.

As *Robinson* was in possession of all the slaves at his death, his administrator had a right to possess himself of them; and, if taken from him, might maintain detinue to recover them; but when taken, or whether taken before or after administration does not appear, and remains uncertain.

The slaves *Jane* and *Jerry*, (or one of them,) not being named in any of the deeds, did not pass to *Brock*; and though said to be descendants of female slaves named in the deeds, are not found to be descendants *since the date of those deeds*. They might therefore have been

born before;—and nothing can be presumed in a special verdict: so that, if I am wrong in other respects, (which is probable since all the other Judges differ from me,) I concur in opinion with the rest of the court, that, as a judgment is an entire thing, and the joint damages, as found, cannot be severed by this court, there must be a *venire de novo*.

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ROBINSON'S Admr. *against* BROCK.

HENDERSON *against* ALLENS.

Thursday, 4th June.

This case was brought up by a writ of supersedeas to a judgment of the District Court held at the *Sweet Springs*. The plaintiffs in the court below (the now defendants in errour,) brought an action, as paupers, for the recovery of their freedom. There had been two verdicts in the cause; the first, which was found for the defendant, (the present plaintiff in errour,) was set aside, on the ground of surprize, and because the issue joined was considered immaterial. On the second trial, the jury found a special verdict in these words:

"We of the Jury, find the issue joined for the plaintiffs, and one cent damages, subject to the opinion of the court on the following points. The plaintiffs *Polly* and *Mima*, were brought into this state in *January*, 1794, as slaves from *Maryland*, and were so prior to their arrival here, and sold to the defendant by a person who bought them there, he being, before the said purchase, a resident in *Virginia*. In *June* following, the plaintiff *Jenny* was born. In *October* following, an application was made to this court, and the following order made with respect to the plaintiff's right by the court: *viz.* "On the motion of the deputy attorney for the Common-"wealth, he is assigned counsel for *Polly Allen*, *Mima* "*Allen*, and *Jenny Allen*, to commence and prosecute a "suit for their freedom, and it is ordered, that *Alexander* "*Henderson*, who holds them in slavery, do not remove "or abuse them, but allow them the liberty of collecting "testimony to prove their right of freedom." In consequence of which order, a suit was instituted and prosecuted for the freedom of the plaintiffs, the writ of which bears date in *May* following:—at the *May* term, 1800, being the 22d of the month, the suit was dismissed by

In a special verdict the jury ought not to find the *evidence*, and submit to the court to determine whether certain *facts* are to be inferred from it; but should find *the facts* explicitly, and submit to the court the questions of *law* arising thereupon.—

To entitle slaves brought into this Commonwealth to freedom, under the 2d section of the Act of 1792, (see Revd. Code. 1 vol. p. 186,) it must appear that they were detained therein by *compulsion* and *contrary to law*.

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virtue of the following order; " *Polly Allen*, *Mima Allen*, and *Jenny Allen*, plaintiffs, against *Alexander Henderson*, defendant, in trespass, assault and battery, and false imprisonment.—The plaintiffs not farther prosecuting, ordered that the suit be discontinued." On the same day, another order was made in these words: " On the motion " of *James Breckenridge*, gent. he is assigned counsel for " *Polly Allen*, *Mima Allen*, and *Jenny Allen*, to commence " and prosecute a suit against *Alexander Henderson*, who " holds them in slavery, to recover their freedom, and " it is ordered, the said *Alexander Henderson*, do not " remove or abuse them, and it is further ordered, " that the said *Polly Allen*, *Mima Allen*, and *Jenny Allen*, " be taken into, and remain in the custody of the sheriff " of *Botetourt* county, till the said *Alexander Henderson* " enters into bond with sufficient security, to the said " *James Breckenridge*, in the penalty of one thousand " dollars, to have them forthcoming, to answer the judg- " ment of the court:" by virtue of which order, the present suit was instituted and prosecuted, the capias of which bears date the same day. If the court shall be of opinion, that under these circumstances, the plaintiffs, *Polly* and *Mima*, were twelve months within the state, before the commencement of this action, according to the true meaning and intent of the second section of the act of Assembly, intituled " an act to reduce into one the several acts concerning slaves, free negroes and mulattoes," then we find for the plaintiffs as to them; but, if the court shall be of a different opinion, we find for the defendant as to them, and if the court shall be of opinion, that the plaintiff *Jenny* has a right to freedom, having been born within five months after her mother's arrival in the state, then we find also for the plaintiffs as to her; but, if the court shall be of a different opinion, then we find for the defendant as to her. On this verdict, the district court decided, that the paupers should recover their freedom and the costs of suit.

Call, for the plaintiff in errour, stated that the defendants claimed their freedom, in consequence of their having been brought into this state as slaves, and of their having remained in the possession of the plaintiff for more than twelve months. On the other hand, the plaintiff contends that his keeping them was an act of compulsion, and in consequence of an order of court which he was not at liberty to disobey.

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He relied on three grounds:

1. That the special verdict was insufficient in not finding that *Henderson* continued to reside in this state from the time when the first action was brought till it was discontinued, and another suit instituted. It may indeed be *conjectured;* but this is only an inference, which can never be resorted to in a special verdict.

2. The next objection (on which he principally relied) was, that, in less than twelve months after the slaves were brought into this state, *Henderson* was inhibited by an order of court from carrying them out of the state. It might have been his intention to have done so. In *January*, 1794, the slaves were brought into the state: in *June* following *Jenny* was born: and in *October* of the same year, *Henderson* was prohibited from removing them. That order continued in full operation till *May* 1800. It was his duty to obey it; and he would have been liable to an attachment for disobedience. While the cause was depending he was bound to take notice of all orders of the court in relation to it. From a well known rule, that every man is bound to take notice of the proceedings of a court of competent jurisdiction, a *pendente lite* purchaser will, in a variety of instances, be bound by the judgment or decree of a court without actual notice. Whether *Henderson* had actual or implied notice, he was bound by it, and was not at liberty to remove the slaves out of the state.

As to the child *Jenny*, the district court unquestionably erred in deciding that she was entitled to her freedom. She was born a slave within the limits of Virginia; because she was born before her mother's right to freedom had accrued.

The Attorney General, for the defendants in errour. The law prohibits, under very severe penalties, the bringing of slaves into this state.(a) It is an illegal act both in the purchaser and vendor, and neither can deserve any favour. *Henderson* cannot pretend that he comes within any of the exceptions of the act; because it is not so found in the special verdict. The words of the law (sect. 2) are explicit, that any slave brought into this state and remaining therein one whole year, or so long at different times as shall amount to a year, shall be free. It is unimportant in what manner they are kept here. The provisions of the law equally apply to them.

(a) Rev. Code ch. 103 pa. 186.

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Although it is not expressly found that *Henderson* kept them in the State from the time when the first order was made for instituting the suit, yet enough appears upon the face of the proceedings to show it; for they were brought into the State in *January*, 1794, and the last order (which was made in 1800,) refers to *Henderson*, who "*holds them in possession.*" But if the court should entertain a doubt on this subject, a *venire facias de novo* ought to be awarded, that this fact might be more specially found.

But it is said, they were kept here under the order of court of *October* 1794. There is no finding of the jury to show that *Henderson* was prohibited from carrying them out of the state; and in a special verdict, nothing is to be presumed. This order was irregular, the slaves not having been in the state twelve months; nor was there any law to warrant such order till 1795. It was a mere *practice*, which might vary in every court. There was consequently no legal process restraining *Henderson* from carrying them out of the state. On legal principles a party is not bound to take notice of a writ till service of it. If this order of court had been authorized by law, still *Henderson* could not be considered as having had notice of it till it was served upon him; and it is no where found that it was served. It cannot be compared to a judgment or decree; because that is never rendered till after regular proceedings in court.

With respect to the child *Jenny*,—both on general principles and the act of assembly, she is entitled to her freedom. On general principles, the rule of law is that *partus sequitur ventrem*. The mother was brought into this state contrary to law. In the period between bringing her in, and her residing twelve months, she created an inchoate right, and the entire residence of twelve months has relation back to perfect that right in her and her posterity. The act of assembly (Rev. Code 1 vol. c. 103. sect. 1.) expressly says "that no persons shall be slaves "within this commonwealth, except such as were so on "the 17th of *October* 1778, and the descendants of the fe-"males of them;" which cannot be alleged as embracing the case of the child *Jenny*.

Call in reply. It is true that the special verdict does not find that *Henderson* had notice of the order of court; nor was there any law which required it. From the practice of the courts, in *pauper* causes, the order was always

considered the foundation of the writ. It would have been a contempt in counsel to have issued the writ without such previous order: and, if it be a part of the record, *in every pauper suit*, where is the difference between such order and a bill in chancery? where a bill, which is the inception of a suit in chancery, is filed, though the subpœna be not served, all subsequent purchasers are bound by it. The terms of the order, and the practice of the courts did not require *Henderson* to be called into court. None of the entries in the proceedings show that any order was served; although, it appears that, in one stage of the business, *Henderson* was attached for not obeying it. If the practice of the courts did not require a service of those orders, then the case stands upon the common ground of a *record;* of which all persons are bound to take notice. It stands on the ground of bills in equity; of judgments which bind lands;—of the recording of deeds, &c.; which affect all persons;—being the judicial act of a court of competent jurisdiction. If the court should not be satisfied with his exposition on this part of the subject, he concurred with the Attorney General that a *venire de novo* ought to be awarded.

The rule being to construe a special verdict strictly, nothing can be inferred that is not specially found by the jury.—In the present case they have only furnished *evidence* by which to infer *facts*. The conclusion of the verdict refers it to the court to infer from circumstances, whether certain facts existed or not. These circumstances are merely conjectured. The *jury* might have inferred facts from them; but the *court* could not.

If the court should be of opinion that *Henderson* (being a party) was necessarily bound to take notice of the order of court, then the judgment must be reversed in toto; but if they should not be satisfied as to the practice in such cases, there ought to be a new trial; in order that those facts may be specially found.

Curia advisare vult.

Saturday, June 6th, 1807. The President delivered the opinion of the court (consisting of all the Judges) that there was errour in this, that the special verdict was uncertain, and insufficient to establish any facts proving that the defendants in errour were detained in this state twelve months, by the compulsion of the plaintiff, contrary to law. Judgment reversed; verdict set aside, and new trial awarded.

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WILLIAM SMITH and MARGARET his wife, late MARGARET CARR, relict and administratrix, &c. of WILLIAM CARR, the younger,

against

Friday, 5th June.

T. CHAPMAN surviving acting executor and trustee of WILLIAM CARR the elder, and others.

A testator makes three devises, (to his two sons and daughter, severally,) for the life of each devisee; and, after his or her decease, to his or her child or children; *if none*, to the other two devisees for life; and then to be equally divided between their children; and annexes a codicil, in which he says that, if *all his children should die without issue of their bodies, his wife living*, the life estate should go to his wife during her natural life, and after her death, remainder to other persons—The two sons and daughter take each an estate for life; and the remainders over are good

On an appeal from a decree of the Superiour Court of Chancery for the Richmond District pronounced by the late Judge of that court.

This case turned upon the construction of the will and codicils thereto annexed of *William Carr* the elder, which were made in the year 1790. So far as the present question is influenced by them, they may be resolved into the following parts:

1. A devise to *Betsey Tebbs* of sundry tracts of land particularly described, together with a negro woman *Hannah* and her children, during the life of the devisee; then to her child or children, if any living at her death, to be equally divided between them; if none living, then to *William* and *John Carr* for life; then to be equally divided between their children.

2. To *William Carr* sundry tracts of land; and, after the death of the testator's widow, a negro woman named *Agga* and her children;—*during the natural life* of the devisee, and after his decease to his child or children; *if none*, to *John Carr* and *Betsey Tebbs* for life; and then to be equally divided between their children.

3. To *John Carr* the lands on which the testator lived, after the death of his widow; and several other tracts of land in the will described, together with sundry negroes therein named;—during his life, and then to his child or children, if any living at his death; if none, to *Betsey Tebbs* and *William Carr* during life; and then to their children to be equally divided.

In a codicil to the will, was the following clause: "Should all my dear children die without issue of their "bodies, my dear wife living, the life estate to go to my "dear wife during her natural life; the other half to *T. C.*, "*S. L.*, and *R. S.* and *T. C.'s* children, namely *C. C.* and "J. during their natural lives; then to their children, if "any; and, after the death of my wife, the whole of what "she has for life in the last clause, to *T. C.*, in trust for "the forementioned children, and my trusty boys, *D.* and "*A.* to be equally divided between them."

JUNE, 1807.

SMITH and wife *against* CHAPMAN and others.

This will was dated on the 23d of *January*, 1790; soon after which the testator died, leaving a widow, the daughter *Betsey*, and his sons *William* and *John*, both infants and unmarried. *Betsey* at that time had several children.

William Carr the younger died on the 8th of *November*, 1801, intestate, leaving a widow, but no children. His widow intermarried with *William Smith* (one of the appellants,) who filed a bill in the High Court of Chancery, claiming in right of his wife, (among other things,) dower in the lands which had been devised to her first husband, *William Carr* the younger.

The Court of Chancery dismissed the bill, from which decree an appeal was prayed to this court.

Botts, for the appellants. This case, so important, as well from the great property depending upon it, as from the questions of law which it involves, turns wholly upon the construction of the will of *William Carr* the elder, and the codicils thereto annexed.

The point now to be discussed is, whether *William Carr* the younger took a *fee*, or an estate *for life* only: if the former, his widow is entitled to dower in the lands devised to him; if the latter, she is not entitled.

I shall contend that *William Carr*, the devisee took a fee conditional at the common law, upon the four following distinct and sure grounds.

I. By the words in the devise to *William's* "child or "children," when he had none, an EXPRESS estate, in fee, in *William* was created.

II. That, if the first point should fail, yet, by the words in the devise over, "if none" (i. e. no child or children,) "to *John Carr*, and *Betsey Tebbs*," an IMPLIED estate in fee was created.—A distinction between a limitation to "children" in *England*, where they *are not* collectively heirs, and such a limitation in *Virginia*, where they *are* collectively heirs, will be relied on.

III. That by the limitation "should all my dear children die WITHOUT ISSUE of their bodies," then over to his wife and the *Chapman* family, an IMPLIED fee would be raised,—should the other points fail.

IV. "That upon the true construction of the will, the "son *William* must, by *necessary* implication, to effec- "tuate the MANIFEST GENERAL INTENT of the testator, be construed to take an estate in fee."

The devise in question is, in effect, to *William Carr* the younger during his natural life, and after his decease

and may take effect; the contingencies not being too remote.

In construing wills made since the Acts of Assembly, of 1776 and 1785, on the subject of estates tail, *it seems* that the courts in this country, will not, by implication turn an express estate for life, with limitations over in remainder, into a fee tail, (as in like cases in *England;*) because, although it is done *there*, to effectuate the general intention of the testator, such a construction under the operation of our laws, would defeat that intention.

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SMITH and wife *against* CHAPMAN and others.

to his child or children; if none, to *John Carr* and *Betsey Tebbs;* and if all three die without lawful issue of their bodies, then to others.

For a long time it was contended that an express estate for life could not be turned into a fee. It is presumed, however, that gentlemen will not say that this is law at this day. A long list of cases might be cited to prove the old doctrine exploded.

It may be admitted that it was the plain and evident intention of the testator that *William* should take only an estate for his life: but then the reason of confining it to an estate for life must by the appellees be conceded to have been to preserve the inheritance for *William's* posterity. To restrict it to a life estate in the first taker was the *particular* intent—to preserve the inheritance *for the issue* was the *general* intent. The former was the *intended means*, the latter the intended *end.* If the two intentions cannot stand together, the particular intent or the intended *means* shall be sacrificed to the *general* intent or the *end.*

That the two intentions cannot, in the principal case, prevail, according to the rules of law, and that the *particular* shall so yield to the general, seems abundantly proved by a long string of cases, of settled and unimpeached authority. The 1st is SHELLY'S case, 21 Eliz. (*a*)

(*a*) 1 Rep. 89.

The case was upon a covenant to lead to uses. "To *Edward Shelly* and his assigns, *for, and during the term of his life* without impeachment of waste, and after his decease to the use of C. for twenty-four years; then to the use of the heirs male of the body of the said *Edward* lawfully begotten, *and the heirs males of the body of such heirs lawfully begotten;* and, for default of such issue, to the use of the heirs males of the body of *John Shelly.*"

It was ruled by eleven out of twelve Judges that *Edward Shelly* took an estate in tail male.

[In *Lisle v. Gray*, (*Thomas Raymond's Reports* 315) the court says, "the rule in *Shelly's* case is positive law not to "be reasoned upon. It is a land mark, by which other "cases are to be bounded." In *Douglas* 507, *note*, it is solemnly sanctioned. In *Roy* and others *v. Garnet* (2 Wash. Rep. p. 16) the counsel for the life estate, admitted its authority, and the court in that case, pa. 31, say, "this "(*Shelly's*) case is constantly referred to, in most, if not "all, the subsequent cases; and its principle, as well as "its authority is no where denied;" v. also Black. Com. 245. Ray. 334. 2 Lev. 60.]

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The 2d case, LYLES *v.* GRAY, in 31 Car. 2d (*b*) was thus:—

John Lyle by covenant, was to stand seized to the use of himself *for life*, without impeachment of waste; remainder to *E. L.* for, and during the term of his natural life; and after his decease to his first son; and in default thereof to the heirs male, &c.

Resolved, that *E. L.* took an estate tail.

3. The ATTORNEY GENERAL *v.* SUTTON, in 1721. (*c*)

Devise to *Thomas* for life; and afterwards to the first son or issue male of his body, and to the heirs male of such son; remainder to *Thomas's* second son, and his issue male in tail; and that immediately upon the death of *Thomas* without issue male, the estate should go over.

Adjudged that *Thomas* had a fee tail.

4. GOODRIGHT *v.* PULLEN, in 1726. (*d*)

Devise to A. *for life;* and after his decease to the heirs male of his body, *and to his heirs forever;* and, for default of such heir male, to *C.* in fee.

Adjudged, that *N.* took an estate tail, and the court added that

If a devise be to *A. for life*, (though the words without impeachment of waste, or with power to make a jointure are put in,) and after his decease to his heirs male; *A.* takes an estate tail; and that this is so settled that it cannot be disputed;—and furthermore,

A devise to *A. for life*, and, after his decease, to his issue (without more words) will give *A.* an estate tail.

5. BALE *v.* COLEMAN, in 1711. (*e*)

Devise to *A. for life*, with power to make leases for 99 years; remainder to the heirs male of his body.

Adjudged that *A.* took an estate tail.

6. TREVOR *v.* TREVOR, in 1720. (*f*)

Marriage articles "To himself for life; remainder to the heirs of his body by his intended wife." The court agreed that if this were other than a marriage settlement, it would be an estate tail.

See *Lewis Bowles's* case, to the same effect, in 13 Jac. 1. 11 Co. Rep. 79.

7. GARTH *v.* BALDWIN, in 1755. (*g*)

Devise to *A.* for life; and, after his death, to the heirs of his body.

Lord Hardwicke decreed an estate tail to *A.*

8. LANGLY *v.* BALDWIN, in 1707. (*h*)

Devise to *A.* for life, without impeachment of waste; with a power to make a jointure; remainder to his 1st,

(*b*) T. Raym. Reports 278. 302. 315.

(*c*) 1 P. Wilims. 57.

(*d*) 2 Lord Ray. 1438.

(*e*) 1 P. Wms. 142.

(*f*) 1 P Wms. 622.

(*g*) Cited by Lord Mansfield in 2nd Burrow1109.

(*h*) Eq. Ca. Ab. 1 vol. 185. Ca. 29.

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2nd, 3rd, 4th, 5th, and 6th sons in tail; and, if *A.* should die without issue male, then to *B.* in fee.

Adjudged that *A.* took an estate tail.

9. BERNARD and FENTON v. REASON. (*i*)

The words "and, if he dies without issue, then to *B.* will turn an express estate for life in *A.* to an estate tail."

10. COULSON v. COULSON, in 13 Geo. 2. (*k*)

11. KING v. BURCHELL in 1759. (*l*)

12. ALLASON v. CLITHERON. (*m*)

13. KING v. MELLING, in 24 Car. 2. (*n*)

14. BLACKBORNE v. EDGLEY, in 1719. (*o*)

15. LONG v. LAMING, (*p*) decided in 1760.

16. PINBURY v. ELKIN, in 1719. (*q*)

17. JAMES'S CLAIM in Sup. Court of Pennsylvania, (*r*) are like the preceding cases; and may be referred to, if necessary.

The cases already cited are accurately abridged; and the Judges may save themselves the trouble of examining them, unless requested by the counsel on the other side; but the three cases of *Robinson* v. *Robinson*,—*Doe* on the demise of *Cook* v. *Cooper*,—and *Roy* and others v. *Garnet*, are of such strength, and contain such clear and apt reasoning, that an inspection of them at large is requested.

18. ROBINSON v. ROBINSON, in 1756. (*s*)

The devise was to *L. H.* for life *and no longer;* and, after his decease, to such sons as he shall have lawfully begotten, taking the name of *Robinson;* and, for default of such issue, to *W. R.* in fee.

The Judges of the Court of King's Bench unanimously certified,

"We are of opinion that, upon the true construction "of the said will of the testator *George Robinson*, the said "*L. H.* must (by necessary implication to effectuate the "manifest *general* intent of the said testator) be construed "to take an estate in tail male; (he and the heirs of his "body taking the name of *Robinson;*) notwithstanding "the express estate devised to the said *L. H.* for his life "*and no longer.*"

The Chancellor confirmed the certificate; and, upon an appeal, the twelve Judges unanimously concurred, and the Lords affirmed the decree.

19. DOE on dem. of COOK v. COOPER. (*t*)

The devise was to *R. C.* for the term *only* of his natural life; and, after his decease, to his issue, as tenants in common; but in case he died without issue, then to *E. H.* in fee.

(*i*) Cited in 3rd Wilson 244, per Lord Chief Justice Rider in delivering the opinion of the court.

(*k*) 2nd Stra. 1125.

(*l*) Cited in 2nd Bur. 1103.

(*m*) 1 Vezey 24. 26.

(*n*) 1 Ventris 214. 215. and in 2d Levintz 58.

(*o*) 1 Peere Willms. 601.

(*p*) 2nd Bur. 1106.

(*q*) 2nd Vez. 766

(*r*) 1 Dallas 47.

(*s*) 1 Burrow 38.* * In the report of this case it is said "that by law "the testator "could by no "WORDS, "have made "the father "tenant for "life, and the "heirs male "of his body "purcha- "sers" v. 1 Burrow 51.

(*t*) 1 East's Rep. 229.

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Adjudged, that to effectuate the *general* intent, *R. C.* took an estate tail.

20. ROY and others v. GARNETT.(v)

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Devise to *James* for and during the term of his natural life; *remainder to the son Muscoe in fee; in trust for the use of the first and every other son of James, who should survive him, in tail male, equally to be divided;* but, if *James* should die without issue male, then to *Muscoe*, &c.

Upon the ground of the interposition of the legal estate in fee, in trust, between the estate for life and the implied remainder to his issue male, it was determined to be only an *estate tail* in remainder, which could never take effect; affirming, nevertheless, that an express estate for life may be turned into an estate tail by implication.

(v) 2 Wash. Rep. 9.

The whole of the *English* law upon this point is collected and methodized in 2 *Fonblanque*, page 58, in the notes.

But, though the cases from 1 *Burrow* 39, and 1 *East* 229, be stronger than the following case, yet, from the more striking similarity between that and the case now in question, it is selected as the one by which the nature of the estate taken by *William Carr* the devisee can be at once unerringly tested.

21. ROE *on the demise of* DODSON v. GREW *et all.* in 1767. (u)

(u) 2 *Wilson*, 322.

Devise to *G. G.* [*Wm. Carr*] to hold for and during the term of his natural life; and, from and after his decease, to the use of the issue male, of his body lawfully to be begotten, and to the heirs male of such issue; and, for want of such issue, to *D. the lessor of the plaintiff* [*John Carr* and *Betsey Tebbs*].

[As a particular comparison of the two cases is intended to be resumed hereafter, when every difference between them will be marked, I will, for the present, content myself with requesting that for "*G. G.*" "*Wm. Carr*" may be read; and for "*D.*" that "*John Carr* and *Betsey Tebbs*" may be substituted, in the case just stated; and that the opinions of the judges may be read with such variations in terms only, as the words used in the two cases will justify. They will be found, in effect, to be precisely the same.]

WILMOT, Chief Justice.

The intention of the testator was clearly to give *G. G.* [*Wm. Carr*] an estate for life only; but his intention also clearly was, that all the sons [children and issue] of *G. G.* [*Wm. Carr*] should take [in succession]. Both of these

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intentions cannot take place; for if the devisee, *G. G.* [*Wm. Carr*] took only an estate for life, his *sons* [children] could never have taken: and although it eventually happened that he had no sons [children], yet we must consider this case as if he had had issue; therefore the Court must put themselves in the place of the testator, and determine as he would have done, if he had been told that both of his intentions could not take effect by the rules of law, and had been asked, which of them he desired should take effect, and stand, if both could not. He certainly would have answered that, so long as *G. G.* [*Wm. Carr*] had any *issue male*, [children or issue] the premises should not go to *the lessor of the plaintiff* [*Bestey Tebbs* and *John Carr*]. The weightiest intention was, that all the *sons* [children or issue] of *G. G.* [*Wm. Carr*] should take [in succession]; and to do that *G. G.* [*Wm. Carr*] must take an estate tail. [V. *Hargr. L. tracts* 503, *Brown's Ch. Repts.* 280.]

CLUE, Justice. In the present case the great intention is to give [in succession] to all the *sons* [issue] of *G. G.* [*Wm. Carr*]; which cannot be without construing it an estate tail.

BATHURST, Justice. It is a rule that where the ancestor takes an estate of freehold, if the word issue in a will comes after, it is a word of limitation. Where there appears a *particular* intent, and a *general* intent, the general intent must take place.—The great view here was, that the land should not go over to *D.* [*J. C.* and *B. T.*] so long as *G. G.* [*Wm. Carr*] had issue; but that general intent cannot take effect unless *G. G.* [*Wm. Carr*] be tenant in tail.

Upon an attentive examination of this case, it will be found that the Judges' opinions are pointedly fitted to the case now in discussion.

The twenty-one cases condensed, exposed, and numbered in the order in which they have been cited, (in all of which estates for life were *expressly* limited) may be put into the following classes:

CLASS I.

Cases, in which "*without impeachment of waste*," "*with a power to make a jointure, or leases*," &c. or words of like import, were added to an express estate for life.

	No.
1 *Shelley's* case	1
2 *Lyle* v. *Gray*	2
3 *Goodright* v. *Pullen*	4
4 *Bale* v. *Coleman*	5
5 *Bowles's* case	6
6 *Roy* and others v. *Garnett*	20
7 *Langley* v. *Baldwin*	8
8 *Blackborne* v. *Edgley*	14

CLASS II

Cases, in which the words of limitation, express, or implied, are to the heirs of the body.

	No.
1 *Garth* v. *Baldwin*	7
2 *Coulson* v. *Coulson*	10
3 *Shelley's* case	1
4 *Lyle* v. *Gray*	2
5 *Goodright* v. *Pullen*	4
6 *Bale* v. *Coleman*	5
7 *Blackborne* v. *Edgley*	14
8 *King* v. *Burchell*	11

CLASS III

Cases, in which the word of limitation was "*issue*."

	No.
1 *Goodright* v *Pullen*	4
2 *James's Claim*	17
3 *Blackborne* v. *Edgley*	14
4 *In same case*	14
5 *Pinbury* v. *Elkin*	16
6 *Allason* v. *Clitheron*	12
7 *King* v. *Burchell*	11
8 *Attorney General* v. *Sutton*	3
9 *Roe* v *Dodson*	21
10 *Bowles's case*	6
11 *Langley* v. *Baldwin*	8
12 *King* v. *Melling*	13
13 *Roy* v. *Garnett*	20
14 *Doe* v. *Cook*	19
15 *Robinson* v. *Robinson*	18

CLASS IV.

Cases, in which words of limitation have been engrafted on words of limitation; as "to *A.* for life, and, thereafter, to his issue, *and the heirs of that issue.* (4)

	No.
1 *Shelley's case*	1
2 *Lyle* v. *Gray*	2
3 *Att. Genl.* v. *Sutton*	3
4 *Goodright* v *Pullen*	4
5 *Roe* on dem. *Dodson* v. *Grew.*	21
6 *Langley* v. *Baldwin*	8

CLASS V.

A case, in which an express estate tail was given to *all* the sons and daughters of the first taker; and in which an estate tail was adjudged in the first taker; though, *expressly* declared for *life*.

	No.
1 *Blackborne* v. *Edgley*	14

CLASS VI.

Cases, in which estates tail were adjudged on express, and also on implied limitation; in opposition to the life estate *expressly* declared.

	No.
1 *Shelley's case*	1
2 *Goodright* v. *Pullen*	4
3 *King* v. *Burchell*	11
4 *Doe* v. *Cook*	19

CLASS VII.

Cases, where the words of limitation only were *express*.

	No.
1 *Goodright* v. *Pullen*	4
2 *Same* v. *Same*	4
3 *Bale* v. *Coleman*	5
4 *Trevor* v. *Trevor*	6
5 *Bowles's case*	6
6 *Garth* v. *Baldwin*	7
7 *James's claim*	17
8 *King* v. *Melling*	13

CLASS VIII.

Cases, in which estates tail have been raised *by implication* only in opposition to *express life estates*.

	No.
1 *Lyle* v. *Gray*	2
2 *Att. Genl* v. *Sutton*	3
3 *Langley* v. *Baldwin*	8
4 *Blackborne* v. *Edgley*	14
5 *Pinbury* v. *Elkin*	16
6 *Bernard &c.* v. *Fenton*	9
7 *Allason* v. *Clitheron*	12
8 *Roy* v. *Garnett*	20
9 *Goodright* v. *Pullen*	4
10 *Robinson* v. *Robinson*	18
11 *Cook* v. *Cooper*	19

CLASS IX.

Cases, where, without either words of limitation express or implied, but in order to effectuate the general intention of the testator, his strongest negative words have been overruled

	No.
1 *Robinson* v. *Robinson*	18
2 *Doe* v. *Cooper*	19

(4) If the words of perpetuity annexed to "*issue*" would not prevent the express estate for life,

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Mr. Botts offered the following remarks upon the classes,—which he had thus arranged.—

Upon the 1st Class.

In almost every case of a power of committing waste, and of making jointures conferred on the first devisee, such power has furnished arguments in favour of the life estate.—See 2nd Wash. Rep. 14.

Upon Class the 4th.

The super addition of words of limitation to words importing a limitation has always been the source of much argument against the estate of inheritance. It was greatly relied on in *Shelley's case* by the counsel, as conclusive in favour of the life estate.

Before we enter into the application of the foregoing cases to the principal case, it should be premised,

1st. That "the construction of wills is not to vary with events;" and therefore this will is to bear the same construction, NOW, (when the devisee is dead without issue,) that it did bear in his lifetime, when there was a prospect of issue. (*x*)

2dly. That, where there is an express estate for life so restricted to preserve the inheritance for the issue, and both intents cannot prevail, the express estate for life shall be enlarged into an inheritance to enable the issue to take through the ancestor.

All the cases affirm this.

I. Upon the first proposition that an express fee is created.

If, instead of "child or children" the word "issue" or "heirs" had been used, the principal case would fail in nothing of being thoroughly settled by *all* the cases before stated, to convey a clear, certain, and unquestionable estate tail.

That "child or children" is equal to *issue* is to be proved; 1st, from express opinions of Judges, and 2dly, from the reason and dialectical, as well as legal import of the words.

And first, from Judges' opinions. *Wild's* case confounds "children" and "issues" as meaning the same thing. (*y*) "Children" and "issue" in their "natural sense have the same meaning." (*z*) A devise to a man *and the children* or issue of his body, is an estate tail "if he had none at the time."(*a*)* Lord *Hardwicke* in 1 *Vezey* 201 says "in *Wild's* "case, 6 Co. and Bendloe 30, it is settled that "*children*" "bear a coextensive sense with issue; and, according to

from being turned into an inheritance, will our act, (Ch. 90. sec. 12 of Rev. Code) supplying words of perpetuity, prevent the construction for an estate tail?

(*x*) Vide Ld. Chf. Justice, WILMOT's opinion on *Dodson v. Grew*, and 2d *Fonbl.* p. 61.

(*y*) 6 Rep. 17.

(*z*) Per Judge *Buller* 3 Term Rep. 493.

(*a*) *Fearne* on Contingent Remainders p. 140. 2 *Fonblanque* p. 71.

* *William* had no issue at the time.

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"authorities, grandchildren and great-grandchildren "come within that rule, to certain purposes."—"Child or children" is declared by Lord *Mansfield* to be the same as issue or heirs. *Douglas* 320—1—2—3—4.

2dly. From the reason and sense of the words.

"Children" in *England* might not have been so apt or strong for a word of limitation as "heirs." But this was the result of the peculiar structure of their law of primogeniture. "Heirs" in *England*, could not be satisfied but by a *succession* of the eldest males—children there, in the natural sense of the word, would embrace the whole in the first degree of blood collectively, and not the eldest in the males successively: but in *Virginia* all the children are heirs. When a man gives to his children he gives to his issue and his heirs. These are, in *Virginia*, all different names for precisely the same thing. The rule of law first solemnly settled in *Shelley's* case is founded in policy and sense, and not in mere words or sound. That case was confined to "heirs," but a distinction between "heirs" and "issues," where the testator meant the same thing, would have been disgraceful to the courts; and accordingly, "*issue*" was brought at once within the rule in *Shelley's* case.

The idea, that *A.* an illiterate testator using the word "issue" or "children" in a will would turn his estate into a different channel from his neighbour *B.*, who should chance to use "heirs," when both words meant the same thing, as well in law as in common parlance, would be making the system of testaments, with those not learned in the law, a system of chance and uncertainty, and more a system of *frustrating* the *will* than of publishing the *will*.

By limiting the estate to the child or children then of the devisee, (i. e. to his child, if but one; if more, to them all;) in law and common sense, as much was done, as if he had limited it, in other words, to his *heirs* or *issue*.

That those words were intended to designate the inheritance rather than any particular persons to take is to be proved from the following considerations.

First, because the testator hath added no words of perpetuity to "child or children;" though, from the devise of the house to *Betsey* and "her heirs," he hath shown that he knew the importance of them; but, by understanding that the difference between the different modes of expressing the inheritance used by the testator ("heirs" in one instance, and "child or children" in the other,) was occasioned by the difference between the estates intended to

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be created, and by making "heirs" apply to the fee simple, and "child or children" to the fee tail, all the parts of the will will harmonize;—

Secondly, because the testator hath not added words of restriction to confine the estates of the "child or children" for life, as he would have done had his meaning been such;

Thirdly, because the testator thought that "child or children" would make an inheritance in the blood of *William;* otherwise he meant to die intestate as to the remainder after the death of the "child or children" (which cannot be believed); for the limitation over to *Betsey* and *John* is not after the death of *William's* children, but in case he had none;—

Fourthly, because by limiting the estate devised to his three children to go out of his blood, upon their dying without issue, he shows that he considered all the issue of those three children in perpetual succession as provided for;

Fifthly, because whenever the testator speaks of his devises to his children, he calls it an estate devised to them.(*b*)

(*b*) 1 *Wash.* 100, 101, 102. 1 *Call.* 15. 1 Eq. Ca. Ab. 178.

II and III. I shall consider the second and third propositions together.—They affirm, that

An estate tail was created by implication from the words "if none," and also from the words "If all my dear children die without issue," &c.

And the consideration of these must, indeed, be short—for the authorities are so conclusive upon the last proposition, that it would be a waste of time to reason upon it. In the consideration of the fourth proposition, some things must be said illustrative of these points; and to them reference is had.

IV. The fourth proposition is,

That to effectuate the main general intent of the testator, this must be construed an estate tail in *William* the devisee.

The testator's intention was either, 1st, that the estate devised to *William* should go over to *Betsey* and *John* before the extinction of the remote issue of *William*, and return back to that remote issue, only in the event of the extinction of the descendants of *John* and *Betsey* before it could go into the *Chapman* family; or, 2ndly, it was the intention that it should never be enjoyed by *John* and *Betsey* till the total failure of issue, remote as well as immediate, of *William*. That the former was not the intention requires no proof.—That the latter was the clear intention would seem to be as plain.

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The testator must have known, at least, that by the law his children were his heirs, and, that in case of intestacy, they would take fee simple estates.—His complicated provisions by will could only be with a view to benefit his children's posterity.—This he thought he could most effectually do by confining it to his posterity without otherwise abridging their power over it.—The preservation of the estate for that posterity may be admitted then to have been the great end of the devise: the restriction of the estate to *William*, during life, may be admitted as the intended means to effect that end. The inquiry then is, whether the *end* can be attained without a sacrifice of the *means;* for, beyond all dispute, if a sacrifice in the case is necessary, the means must fall to the *end*, and not the end to the *means*.

William, the devisee, was an infant, unmarried, and childless when the will was made.—His posterity had not then become the objects of the testator's bounty, from habits of intercourse, or from personal attachment. But the blood derived from the testator to run in the veins of *William's* posterity was the filament that bound the former to their interests.—And wherever that blood should be found, the person that contained it was within the sphere of the gift. There was equal reason to provide for the issue of the issue of *William* as for the first issue. (*c*)

If *William* does not take an estate of inheritance, his remote issue could never take.

(*c*) *King* v. *Melling*. See *Leithr.* v. *Tracy*, 3d *Atkins* 749, 788.

"Child or children" cannot at the same time be words of purchase and words of limitation. If they are words of purchase, then they could take only life estates; if of limitation, then the children would take *ad infinitum*. The 12th Sect. of the 90th Ch. of the Statutes in the Rev. Code does not apply; because that section contemplates none but plain devises to "one" where the inheritance is not parcelled out to many; and because that act has influence where fee simple estates *only* are to be created; which could not have been the intention here, without supposing the testator guilty of the folly of attempting a restraint on the alienation of his own living child, (in whom he had enough of confidence to make him an executor) and yet to intend that his grandchildren, then unborn and unknown, should enjoy the estate with uncontrolled rights of alienation.

[2 *Wash.* 25 and 28.]

If, without construing it an estate tail in *William*, the remote issue of *William* could, in the event of his leaving children living at his death, take through those children,

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yet grandchildren of *William* the devisee could not take immediately, or otherwise, in case of the death of *William's* children before the death of *William*.

Thus, suppose *William* the devisee had a son *A.* who had a child *B.*;—then *A.* had died. *B.* the child of *A.* could not take the estate devised to *William*, the grandfather of *B.*, without claiming the inheritance through that grandfather; because, if "child or children" was to designate the person to take, the grandchild would not come within the designation.

In the case last supposed, it might happen that the estate of the testator might go out of his blood, and out of the *Chapman* family, while each of his three children had numerous suffering posterity; unless *William* could be construed to take an estate tail.

Thus, suppose *Betsey* and *John* to have died, and left each a grandchild alive. Upon the death of *William*, leaving himself a grandchild, but no child, the grandchildren of *John* and *Betsey* could not take the estate; but it would go to the children of the *Chapmans*; and if they had been placed, by births and deaths, in the same predicament, the testator's estate, upon the death of his son, would be undisposed of; or, if it vested in the *Chapman* family it would go, in perpetual succession, to them; to the utter exclusion of the posterity of the testator.

Again, if *William* does not take an estate of inheritance, it would be subject to run perpetually in the branches of his posterity,

Thus, suppose *William* to have two children, *A.* and *B.*, both of whom have issue; *A.* dies in the lifetime of *William*; then *William* dies; and then *B.* his son dies. Now, if the issue of *A.* cannot claim as heir to the grandfather *William*, he cannot claim at all; since he is not the "child or children" of *William*; and the estate, having vested in *B.* on the death of *William*, would go to *B.*'s issue in exclusion of the issue of his eldest brother *A.*: and the same might happen to *John* and *Betsey's* posterity.

See the curious case described by the Court of Appeals, 2 *Wash.* p. 33.

But we may go further.

If *William* did not take an estate tail, his immediate issue could not take.

They could not take, because they were not in *esse* at the time of the devise, for the estate to vest in them.(*c*) And the doctrine of executory devises would not aid the case; for here the particular estate was sufficient to support the

(*c*) 2 *Wash.* p. 31.

contingent remainder; and, where that is the case, the disposition shall never be construed an executory devise.(*d*) It cannot be supported as a contingent remainder, because (without going further into the rules and policy of the feudal law) it depended upon a double contingency; 1st, upon that of *William's* having children; 2ndly, upon that of those children surviving *William*.

The limitation to *Betsey* and *John* is after an indefinite failure of issue in *William*, and void.(*e*) So that the object of the testator, so far as it relates to the preservation of the estate for them, is opposed by the rules of law.

Thus, from a review and comparison of all the cases upon this subject, it is clear, that to secure the estate to the remote as well as immediate issue of *William*, (the great intent of the testator) his own means, from their total unfitness, must be sacrificed.

But, after this general review, the promised comparison of the case of *Roe* on demise of *Dodson v. Grew* with the present case is to be taken up.

Roe, &c. *v. Grew.*	The present case.
1st. The devise is to *G. G.* for and during the term of his natural life.	1st. The devise is to *William* during his natural life.

There is no material difference between these members of the 2 devises.

2nd. And from and after his decease,	2nd. After his decease,

The sense is the same in both instances.

3d. To the use of the issue male of his body, lawfully to be begotten; and to the heirs male of such issue.	3d. To his child or children.

In the case from *Wilson*, now under comparison, the differences between the last mentioned member of the devise and the corresponding member of the present case are as follow:

1st. To the *use*, which is not in the present case.—

2nd. The limitation is to the issue male of his body lawfully begotten, instead of "child or children."

3d. And to the heirs male of such issue; and,

1st. It being to the use of *G. G.*, instead of being devised at once to *G. G.*, makes no difference; for "Trusts are to be governed by the same law, and are within the same reason as legal estates, and this is a maxim that has obtained universally.(*f*)

(*d*) 1 Lord *Ray.* 208. 3 *Wils.* 244, 246. *Douglas*, 267. *Saunders*, 380.

(*e*) 1 *Wash.* 71. 1 *Call*, 344. 2 *Call*, 316, 317.

Brown's cases in 1786 p. 33, 34, and 127. Note the difference between the devise to *Wm.* and to *John* and *Betsey*.

(*f*) Eq. Ca. Abr. 2 vol. p. 738.

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2nd. The entail in the issue male is the same thing to this purpose as a general entail.—Most of the cases cited in this argument were cases of general entail; and no distinction to this purpose was ever taken by counsel between a general and special tail. "Issue," I have shown, is the same as "child" or "children."

3d. When words of limitation are added to "issue," to give effect to the words of limitation so added, "issue" should be made a word of *purchase*. Yet the Courts, in *Shelley's* case; *Lyle v. Gray; Attorney General v. Sutton; Goodright v. Pullen;* and *Langley v. Baldwin*, have rejected those words of express limitation, rather than submit to the frustration of the intent, resulting (under the rules of law) from making issue a word of purchase, so as to prevent the first taker from having a fee.—*But, if the words of limitation added to issue cannot make the issue take as purchasers, surely the Act of Assembly (Rev. Code Ch. 90. Sect. 12.) cannot do more than the express words of the testator to the same effect.*

4th. And for want of such issue to *Dodson*.

4th. If none, (i. e. no child or children) to *Betsey Tebbs*, &c.

And again,

"If all my children should die without issue, then over, &c."—

It would surely be difficult to maintain, that these implicative branches of the devise, in the present case, were not as strong as, "for want of such issue, to *D.*, &c."

The estate could never go to the *Chapman* family but "for want of issue in *William;*" nor could it go to *John Carr* or *Betsey Tebbs* but "for want of such issue:" otherwise, if it went to *Betsey*, or *John*, before the extinction of *William's* issue, it must return to *William's* issue, upon the extinction of *John* or *Betsey's*, before it could go to the *Chapman* family; and if this is not the case, the estate would go to the *Chapman* family, without "want of issue of *William*," contrary to the express words of the will. Now, that the estate should go from *William's* issue, before their extinction, to *Betsey* and *John*, and then return to *William's* issue, under the will, in any event, is too absurd to be the presumed intent of the testator; much less could it comport with rules of law: so that it is true that under the words "If all my children die without issue, the estate is to go over, &c." the estate can never go to *John* or *Betsey*, or to the *Chapman* family, "but for want of issue of *William*."

Vide *Wilmot's* reasoning, ante.

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The implicative branch of the devise in *Roe v. Grew* ("but for want of such issue") was sufficient to turn the express estate for life into an estate tail, without the express limitation to the issue of *G. G.* And *Lyle v. Gray*, *Attorney General v. Sutton*, *Langley v. Baldwin*, *Blackborne v. Edgley*, *Pinbury v. Elkin*, *Bernard v. Fenton*, *Allason v. Clitheron*, *Roy v. Garnett*, *Robinson v. Robinson*, and *Goodright v. Pullen*, were all cases in which express estates for life were turned into estates by implication.(c)

If I am correct in the foregoing conclusions, *William Carr* the younger was seised of a fee conditional at the common law, which, when operated upon by the Stat. *de donis*, and by the Acts of 1776 and 1785 docking entails, turned it into a fee simple estate, of which the widow is dowable.

(c) If this be correct, is it not of consequence to consider whether "child or "children" be the same as "issue" or not.

Wickham, for the appellees. In this case the claim of dower is merely incidental, and depends upon the previous question whether *William Carr* the younger took an estate for life or in fee. The will is plain, and shows the intention of the testator to give an estate for life only. This is the plain and obvious construction, and the only one which it will bear, unless artificial rules be interposed.

There are two rules to be observed in construing wills. The first is a rule of general policy, which prevents perpetuities. The utmost limit allowed by law (except that, in England, an estate tail, which is a peculiar species of perpetuity, is expressly authorised by statute,) is an estate for a life or lives in being, and twenty-one years afterwards.—This rule is not infringed by the testator in the present instance: for the devise is to *William Carr for life*, and, after his decease, to his *child or children: if none*, (that is, no children,) remainder over. Nor is the residuary clause in the codicil too remote; because it is limited to the children of the testator dying without issue, *living his wife*. So that he intended the estate to be final on the death of his son and wife, both of whom were then in being.

The second rule is, that, in following the intention of the testator, the *general intent* is to be regarded in preference to the *particular intent*, *if they interfere;* but *not otherwise*. For example; an estate to *A.* and his heirs; and, if he die without issue, remainder over; this is an estate tail. So to him for life and his issue afterwards; and, if he die without issue, remainder over. The particular intent of an estate for life gives way to the general

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intent to provide for his issue;—otherwise the issue would only take a life estate.

But if the particular intent and general intent be consistent, both shall stand. Such as an estate for life, and remainder to the issue and the heirs of the issue; both shall stand together.

I will lay down another rule; that wills in both countries should be construed according to the existing laws, unless the contrary appears to have been the intention of the testator. Thus, in England, estates tail being allowed by statute, the courts will presume that the testator meant to create such an estate; if such general intention can be collected. In this country, they are not allowed; and you will not presume that the testator meant such an estate, unless the words plainly import it, or it be necessary to effectuate his general intent. *There*, if an estate be to *A.* for life; remainder to his issue, without words of inheritance; the issue will take only *for life;* if they take as purchasers. In order, therefore, to carry into effect the general intent, the courts will construe it into an estate tail. *Here*, words of inheritance are not necessary, by express Act of Assembly; and the general intent may be answered without presuming an estate tail. The Act of Assembly may properly be referred to on a question of intention. Estates tail are presumed in England, because allowed by Act of Parliament;—estates in fee simple are presumed in this state, because allowed and *directed* by Act of Assembly. This does not interfere with cases, where it is apparent an estate tail was intended; because in such a case the Act of Assembly turns it into a fee simple. In the case before us it is apparent that an estate for life only was intended.

We come now to the question whether "child or children" operate as words of limitation or of purchase. If they operate as words of limitation they carry a fee; if as words of purchase, an estate for life only, and the widow is not entitled to dower.

But it is supposed by *Mr. Botts*, that he has found a case apposite to this;—*Roe* on the demise of *Dodson v. Grew.*(*a*) I have taken a very different view of it. In this case it was intended by the testator, that all the children should take together. In that case, they took in *succession*, and not *together*. The case turned altogether upon this point. So, in *Roy v. Garnett*,(*b*) in the very luminous argument delivered by *Mr. Campbell*, the same distinction is taken. But it is said, that, in this country,

(*a*) 2 Wilson 322.

(*b*) 2 Wash. 22.

all the children take together, and not in succession; and, therefore, though it would not be an estate tail in England, it would be here; because the children take by descent. Admitting this to be so, it does not vary the intention of the testator: and, if the argument prove any thing, it only proves that the English cases are not applicable. But this position is not correct. It is understood to be a settled rule of law, that, if a man devise lands to all his children, in this country, they take by devise; but, if he have but one child, he takes by descent, because the better title. So, in England, it is laid down as a general rule, that, though the ancestor *devise* the estate to his heir, yet if he take the same estate in quantity and quality that the law would have given him, the devise is a nullity, and the heir is seised by descent: but, if the devise be to coparceners they take by purchase.(*a*)

The next, and one of the principal cases relied upon by the counsel on the other side, is *Robinson v. Robinson.*(*b*) It appears from the certificate of the Judges in that case that the general intention of the testator could not have been carried into effect without construing the devise into an estate tail. There were no words of inheritance in the devise to the son. Consequently, in England, he would only take a life estate, but here, a fee. In *Doe* on the demise of *Cook v. Cooper*,(*c*) the issue took intermediate estates for life, and not an immediate estate tail, as seems to be taken for granted by *Mr. Botts*. A limitation over on a general failure of issue would have been necessary to make it an estate tail. There were no cross remainders, as in the case now before the Court.

But it is argued, that if our construction should prevail, the grandchildren might be excluded. The testator might never have thought of providing for the children of children dying in his lifetime. This frequently happens; and there never was a question but that the children of such were excluded. The case of *Roy v. Garnett*(*d*) is next relied on. It may be sufficient to say, that no opinion of the Court was given upon any point in that cause, which bears upon this. Judge *Pendleton* (in page 34) gives only his own opinion. [Here *Mr. Wickham* referred to the argument of *Mr. Campbell*, in that case, and went into a minute comparison of the two cases to show that they were quite dissimilar.]

The devise being to the children of *William Carr* the younger *generally*, and not restricted to one or more *living at his death*, the moment a child was born it took a vested

(*a*) See 1 Salk. 242. *Reading v. Royston.*

(*b*) 1 Burr. 38.

(*c*) 1 East, 229.

(*d*) 2 Wash. 9.

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interest. It may be urged that, it was uncertain whether any child would be born, or whether more than one. That does not vary the rule of law. A child may take a vested interest, though the proportion be not ascertained. The interest is vested at the moment of the birth of the first child; but the proportion may be varied by after-born children. If there be but one child, it takes the whole.

It may be laid down as a rule of law, that an estate may be vested in *interest* in remainder, though the *proportion* be uncertain. Like the common case of an estate to *A.* for life, remainder to *B.* for life. Here the estate to *B.* is *vested*, though he may die in the lifetime of *A.* But if it be to *A.* for life, remainder to the heirs of *B.*, it is *contingent*, because it is uncertain who is the heir of *B.*

If an estate be given to *A.* for life, remainder to all his children and heirs, all the children take and the representatives come in. *Attorney General* v. *Crispin.*(*e*) *Doe* v. *Perrin.*(*f*) This last is the very case before the Court, if we throw out the words of inheritance. There the children taking by purchase, the moment one was born it took in remainder. In this case, if none were ever born, the life estate of the father supported our remainder, and we take. The Act of Assembly makes it necessary for the Court to construe an estate to "children" in the same manner as if the word "heirs" had been added.(*g*) The Court must, therefore, presume that the testator meant a fee to the children of *William Carr* the younger. The word *heirs* is not necessary to carry a fee, because the law is so; and the Court will intend that the parties meant to conform to the law. But, it is said, the Act of Assembly speaks of a conveyance to *one*. The answer is, that *many* includes one.

(*e*) 1 Bro. Chan. 386.

(*f*) 3 Term Rep. 484.

(*g*) See Rev. Code, Pleas. Edit. Ch. 90. Sect. 12. pa. 159.

Mr. Botts argues on the supposition that the estate was conveyed to the children in *succession*, and, therefore, the Act of Assembly turned it into an express estate in fee in *William*. But in this country the children do not take in succession, but altogether.

He then proceeds to notice the import of the various words, *issue*, *children*, and *heirs;* and states that "issue" is equivalent to "heirs," and "children" to "issue."—In the case of *Roe* on the demise of *Dodson* v. *Grew*,(*h*) *Wilmot* and *Clive* Justices, in delivering their opinions, expressly lay it down, that *issue* is either a word of limitation or of purchase, and must always be applied so as best to effectuate the intention of the person who uses it. In 3 *Term Rep.* 493. Judge *Buller* says that *children* do

(*h*) 2 Wilson, 322.

not mean *heirs*. The same doctrine may be found in *Robinson v. Robinson.* (*i*) In *Morris v. Owen* (*k*) it was determined that a power of appointment to *children* did not include *grandchildren;* but that the word *issue* would have been sufficiently comprehensive; so that if *children* had been equivalent to *heirs*, the *grandchildren* might have taken. But in all the cases where those words have been used, their application has depended upon the *intention* of the person using them.

(*i*) 1 Bur. 38.
(*k*) 2 Call. 520.

In this case there was a contingency with a double aspect, and a life estate to support it:—as to *A.* for life, remainder to the heirs of *B.*; but if *B.* be living at *A.'s* death, to the heirs of *C.* But if the life estate shall be extended to a fee, it is an executory devise of a fee after a fee: and, if the limitation be not too remote, they take one way or the other. It is, therefore, a mere question of names. In the present case it was not too remote; for in another member of the devise, the testator says, if "all my dear children die, *living my wife*," &c. so that it is to take effect during a life in being.

But the true construction of this will is, an estate to *William* for life, remainder over. It is objected, however, that in this country all the children take by descent, and, therefore, a descent must be intended. This is a mere question of intention. Did he mean to give an estate for life to his children or an estate of inheritance? Unless we resort to artificial rules, there can be no doubt of his intention to give a life estate only. But these rules are never resorted to, except when the general intent and particular intent conflict. Here the general and particular intent agree. An estate was meant for life; after the death of the devisee, his children take as purchasers; but as the testator contemplated that he might have none, he gave it to others in remainder. What rule of law or of policy is violated by this disposition?

Love, on the same side. The only question now to be considered is, whether *William Carr* the younger took an estate for life, under the will of *William Carr* the elder; or whether, by implication of law, he took a fee simple.

The clause in the will of *William Carr* the elder, which is the subject of discussion, is in these words: "I give "and bequeath to my son *William Carr* during his natu- "ral life, the lands," &c. (going on to describe them, and concluding this clause by the words) "I say I give the "aforesaid lands and negroes to my dear son *William Carr*

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"during his natural life; and, after his decease, to his "child or children; if none, to my son *John Carr* and "my daughter *Betsey Tebbs* for life; and then to be "equally divided among their children."

I shall here notice the further disposition which seems to have been made of the property specified in this clause, by the words in the second codicil to the said will, which are, "should all my dear children die without issue of "their bodies, my dear wife living, one half the life "estate to go to my dear wife during her life, the other "half to *Thomas Chapman*, *Simon* and *Robert Lutteral*, "and *Thomas Chapman's* children, namely, *Carr Chap-* "*man*, *Charles Chapman*, and *Jenney Chapman*, during "their lives, then to their children, if any, after the death "of my dear wife, the whole of what she has for life, in "the last clause, to *Thomas Chapman* in trust for the "forementioned children, and my trusty boys *Daniel* and "*Arch*, equally to be divided between them."

The will, and the two codicils are dated the 23d day of *January* in the year 1790, the testator departed this life in *November* in the same year, and on the 8th of *February* 1791, the will and codicils (being proved to have been *all in the hand writing of the testator*) were admitted to record in *Prince William* County Court.

All Courts have agreed that the intention of a testator is to be the leading rule of construction in wills; and that such intention is to be collected from the words of the will, in the first place.

I therefore take the position as correct, that if the intention is plain from the words, they will give effect to the will in their common import, unless they are shown to be in a state of hostility to some fixed and incontrovertible principle of law in the limitation of property; as in *Shelley's* case, and in *Hill v. Burrow*, 3 *Call* 353, &c.

When, in the same clause of the will of *William Carr*, we find him twice expressing his devise to his son *William* to be for life, it would seem that such words could not have been produced by accident; but that such a disposition of the property was not only intended, but formed a leading feature in the wishes of the testator.—This intention is admitted to be clear, and is called his particular intention by the counsel for the appellants in contradistinction to his general intent.

And here I am willing to admit that, if the particular and general intents are found to clash with each other, the former must give way; but I do not admit that the general

intent is to be confirmed, so as to defeat the remainders at all events.

At the same time I claim, if the particular and general intent can both be answered and stand together, that they shall do so; for the whole intention must be answered if the rules of law will admit of it; (*a*) and it is a maxim that all parts of an instrument shall have effect if possible.

I shall, in order to show that both the particular and general intent attributable to *William Carr* in his will may take effect, (thereby giving to his son *William* an estate for life, of which his widow could not be endowed, and to his child or children a *contingent remainder*,) take two distinct views of this case.

(*a*) 1 Burr. 51—2. Wash. 9, *Roy* v. *Garnett*, 2 Fonbl. 60.

1st, I will endeavour to show that,

Under the principles of decision which have obtained in cases of this kind in the courts of England, this devise *may* be adjudged to give to *Wm. Carr* the younger, an estate for life; and that such a construction does not conflict with the settled rules of the common law;—

2nd, That, under the principles which necessarily flow from the unavoidable interpretation of our own laws, to give effect to the testator's general intent, the estate *must* be construed to be for life only in *Wm. Carr* the younger.

As to the first view;

I shall endeavour to select such cases as come nearest in words and principles to the case pending: for I am aware, from the researches I have been able to make on the subject of construing wills, of the truth of Justice *Wilmot's observation* adopted by the president of the Court of Appeals, "that cases on the construction of wills rather serve to embarrass than elucidate;" (*b*) "that cases in the "books on wills have no great weight, unless they are ex- "actly on the very point. (*c*)

(*b*) 1 *Wash.* 266, *Shermer* v. *Shermer's* Exor

The few cases which I think may be fairly argued from, in forming a decision on the present one, I will arrange as follows.

(*c*) 2 Willes, 324.

Archer's case, (*d*) was a devise to *Robert Archer* during his natural life; and, after his death, to his right and next *heir*, and to the heirs of his body, &c.

(*d*) 1 Co. Repts. 64.

It was agreed by the whole court that *Robert* was only tenant for life.

Wild's case. (*e*)

(*e*) 6th Co. Repts. 16.

This case I shall endeavour to show is a very direct authority in favour of the defendants, on common law principles.—It was in remainder to *Rowland Wild* and his wife, and after the decease of their children.—*Rowland* and

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his wife were adjudged to take an estate for life, and their children also an estate for life only. Three rules in the limitation of estates were in this case agreed, which seem to have been no where contradicted; but the one applicable to the case pending seems to have been recognized as authoritative, as I shall show.

1st. If *A.* devise his lands to *B.* and his children, or issue, (*without limiting the time* when the estate in the children is to take effect,) and *B.* has no children at the time, the same is an estate tail.

2nd. If *A.* devise his lands in like manner to *B.*, and *B.* hath children at the time, they shall be a joint estate for life.—

3d. "If a man devise land to husband and wife, and, "*after their decease*, to their children, or the remainder "to their children; in this case, although they have not "any child at the time, yet every child, which they shall "have after, may take by way of remainder, according to "the rule of law; for his intent appears that their chil- "dren should not take immediately, but after the decease "of *Rowland* and his wife."

(*f*) *Willes'* Rep. 353.

Wild's case is referred to in *Ginger* v. *White*, (*f*) where it is said the reason of the 3d rule arises from the words, "*after his decease;*" because it is thereby shown, that the devise to the children was intended as a remainder—So in the pending case the estate in remainder is expressly limited to take effect, after the decease of *William Carr the devisee.*

That the words used in the devise to *William* are to have the same effect, and construction as those used in the devise to *John* and *Elizabeth*, is proved by the common meaning annexed to the words used in these different clauses, and is also plainly to be deduced from one of the main general intents of the devisor.

It is proved by the words. For I hold the words, "*after his decease*" which are found in the devise to *William*, and not in the devises to the others, to be tantamount to the words, "*living at his* (or her) *death*" found in the devise to *John* and *Betsey* and not in that to *William;* and those used in the devise to *William*, as competent to fix the time of a failure of children, and when the remainder should take effect, as those used in the devises to *John* and *Betsey.*—It is also deducible from one of the main general intents of the testator, which evidently was to divide his estate equally among his three children, and to make them take in the same manner. He has measured out their estates by the same rule in point of duration; has

established, in each, cross-remainders in express terms;—and finally, has expressly declared in the first codicil, that it is his will and desire that all his dear children should have equal shares of his estate. It cannot be presumed that these devises of his property to his children, could have been intended to be governed by different rules.

The case of *Ginger* on the demise of *White v. White* (*g*) decided in the Common Pleas in 1742, I consider as strong British authority in our favour—The case was *John White* the elder, grandfather of the lessor of the plaintiff, having two sons, *Henry* and *John*, and one daughter *Sarah*, devises a part of his house to his wife for life; and, after her decease, that part, with the rest of the premises, to *John* for his life, and to *Sarah* for life, in case she live unmarried, in common, between them; but in case *Sarah* marry or die before *John*, then in either of the said cases, the said *John* shall have the whole use of the house for his life, and, after his decease, to the male children of the said *John*, successively, and one after another, as they are in priority of age, and to their heirs, and in default of such male children, to the female children of *John*, and if *John* die without issue, he wills the premises to his grandson *John White* and his heirs.

(*g*) *Willes'* Rep. 348.

John the son had no issue at the time the will was made or since. On the death of the testator, *John* and *Sarah* entered. *Sarah* died, and *John* survived her; and *John* entered on the whole premises, suffered a common recovery and declared the uses to himself and his heirs, and afterwards settled the premises on the defendant *Elizabeth* and her heirs. *John* the son died, afterwards, without issue, *Henry* the eldest son still living; and *John* (the grandson and devisee) was the lessor of the plaintiff.

The question was, whether *John* the son took an estate tail, and so had power to suffer a recovery and bar the remainder to *John*, the grandson, or whether he was only tenant for life.

Lord Chief Justice *Willes*. "This is the general question; but it will depend on two points.

1st. Whether *John* the son took an immediate estate tail by the devise to his male and female children.

2nd. If he did not, whether these words, "In case the said *John* should die without issue," did not give him an estate tail by implication in remainder, after the limitation to his children; for, in either case, the recovery would bar *John* the lessor, because he claims by the subsequent devise, "in case *John* his uncle die without issue." In

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this case the Chief Justice gave an opinion very much at length. He reviewed the cases of *King v. Melling*, *Langley v. Baldwin*, *Shaw v. Weigh*, *Popham v. Bamfield*, *the Attorney General v. Sutton*, *Lodington v. Kime*, and *Law v. Davis*, which were the most important cases, at that time decided, and some of which are now relied on in the argument of the counsel for the appellants.

The Chief Justice delivered it as the opinion of the Court, that *John* the son took only an estate for life.

The words "after his decease," and the word "children," used by the testator in the case of *Ginger v. White*, and also in the pending case, are very important, and may be argued from in the same manner in both cases.

The devise to the children of *John* and their heirs, successively according to priority of age, confined the disposition as closely to the law of descents in England, as the devise to *William's* children does to the law in this country, on the supposition that if *William* had had children they would have taken a fee simple, under the operation of the Act of Assembly of 1785, which dispenses with the use of words of perpetuity—There is certainly as strong an analogy between the two cases, as could be expected to be found, between words, and the ideas correspondent to them, which at different times, were used by different men, neither of whom intended to use, or were capable of using technical expressions in developing their minds.

The Chief Justice, in explaining what are considered as express words to enlarge an estate for life into an estate tail, says, "such words as *ex vi termini* create estates tail, are admitted to have that effect," because of the rule, I presume, in *Shelley's* case.

This distinction will be found important in reply to the cases cited by the counsel for the complainants—For, in most of them, either an express estate tail is limited to the issue, or such words are used as in themselves import an estate tail, and are taken to convey such an estate.

(*h*) 3 *Wilson*, 399.

The case of *Fell v. Fell* (*h*) was a devise "To *Solomon* "*Fell* for life, and after his death to his son *Thomas*, and "his heirs male forever, the elder to be preferred before "the younger, and, if no male issue left behind, then the "estate to devolve to the females, and, if no females, the "estate to devolve to the said *Solomon* to dispose of as he "thought proper." The defendant, *Solomon* had, at the time of the testator's death, *Thomas* his eldest son, and the plaintiff his only daughter, and no other children. *Thomas Fell*, the son, died soon after the testator; and the plaintiff, the daughter of *Solomon*, was his only surviving

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child. By her a bill was filed to restrain the defendant *Solomon* from committing waste; and a case being sent to the Court of Common Pleas, for their opinion as to what estate the defendant took under the will, the Judges certified "that they were all of opinion that *Solomon Fell* the defendant, took an estate for life, and, his son *Thomas* dying without issue, his daughter took an estate tail."—This case is similar to *Archer's* case mentioned before. I consider it as important, because it shows that the express intention to limit a remainder shall have effect, although it might by possibility destroy a general intent; which, in this case was, that so long as there was issue of *Thomas* the estate should not go over; which general intent, it is said, could only be effected by construing these intermediate express devises for life into estates tail by implication.

Although there are many other cases among the more modern reporters which might be adduced to show that, even on common law principles, the life estate and inheritance did not unite in *William Carr* the younger under the devise by his father, I think the argument may be shortened, and the case placed in a more intelligible point of view by noticing here some of the authorities adduced by the counsel for the complainants.

Shelley's case is first relied on—

By which an estate tail in the heirs male of the body of *Edward Shelley* is created, by *express terms* after an estate for life to *Edward Shelley;* and for default of such issue, remainder over, &c.; and it was adjudged that *Edward Shelley* took an estate tail—there are many reasons against the influence of that case on the present; for I admit *Shelley's* case to be still an unbroken pillar of the feudal system, which cannot be demolished and thrown with the rubbish of the dark ages; but 1st, I must show that it does not lie in our way, and that it is not necessary for us to encounter it.

This was a conveyance made by *Edward Shelley* by way of covenant to stand sesied to the use of himself for life &c.; and was an attempt to evade the common law principle derived from the nature of feudal tenures, which was as old as the system itself; "that a man shall not by any means make his heirs take from him by purchase."

2d. It was a principle altogether unconnected with the right of devising; and, if that right did exist at common law, (which some suppose,) was in opposition to it; perhaps in suppression of it.

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3d. It is a principle, which has in a great measure lost its effect in England, by the Stat. of 32 Hen. 8th—permitting devises, &c. and the rules which have been adopted in the construction of devises by the British courts.

In 2 *Burr.* 1107, *Ld. Mansfield*, says, "The reason of this maxim has long ceased, yet, having become a rule of property, it is adhered to in all cases *literally* within it."

It is unnecessary to remark the material difference between the words of the instrument in *Shelley's* case, and those in the devise before us. *Christian*, in his notes on 2d Book of B. Com. pa. 20, lays down the rule in these words, "When the ancestor by any gift or conveyance takes "an estate of freehold, and in the same gift or conveyance an estate is limited mediately or immediately to "his *heirs* in fee or in tail, always in such cases, the *heirs* "are words of limitation and not of purchase."

So subservient however has this common law rule become to the intention in wills, where plainly expressed, that the smallest literal deviation will destroy its influence. The word *heir* in the singular number, used instead of the word *heirs*, will take it out of the common law rule; *Archer's* case, (*i*) and 2 *Burr*, 1110; although the rational interpretation of the two words, is certainly the same as was said by one of your honours in *Hill v. Burrow*. (*k*)

(*i*) 1 Co. Rep. 66.

(*k*) 3 *Call.* 342.

In a devise of *Gavelkind land* the word heirs is not a word of limitation, 2 *Burr.* 1110.

In the case of *Long v. Laming*, from which the last citations are made, *Ld. Mansfield*, pa. 1109, says, "There is "no such fixed and invariable rule, as has been supposed, "that words of limitation shall never in any case be construed as words of purchase." And in pa. 1111, "There "is no rule of law that prevents *heirs* taking as purchasers when the intention of the testator requires that they "should do so."

Justice *Dennison* (*ibid.*), said, "It is not inconsistent "with the rules of law that heirs of the body should in "some cases be construed as *designatis personæ*, &c. "therefore the heirs of the body of *A. C.* must take by "purchase."

Justice *Wilmot*, cited a case of *Baker v. Snowe*, which was a conveyance to *E. E.* for life; remainder to his first son and the heirs male of his body; and so to his six sons; remainder to the right heirs of *E. E.*; it was holden to be only a contingent estate, and not an estate tail in *E. E.* *because it was limited to particular persons.* "The words "*heirs*, *heirs male*, or *heirs of the body* are not to be

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"construed as words of limitation either in a will or deed, "where the manifest intention of the testator or the par- "ties is declared to be, or clearly appears to be, that they "shall not be so construed." *ibid.* 1112-13.

By these respectable law opinions and decisions, the rule in *Shelley's* case, which was a particular object of discussion, seems to be subdued to the more rational one of intention; or to be so narrowed in its operation as not to embrace our case.

In *Perrin v. Blake*, (*l*) the rule in *Shelley's* case is also made the subject of discussion; the reason of it explained on common law principles, and that reason said to have ceased to exist: The limitation was within the rule in *Shelley's* case. *Ld. Mansfield*, Justice *Ashton*, and Justice *Willes*, held the ancestor to take an estate for life; Mr. Justice *Yates*, *contra*. A writ of errour was brought in the exchequer chamber, and Mr. Justice *Blackstone*, who was of opinion for the plaintiffs, notwithstanding laid down the doctrine in these words: "If the intent of the "testator manifestly and certainly appeared, by plain ex- "pression, or *necessary implication from other parts of the* "*will*, that the heirs of the body of *A.* should take by "purchase and not by descent, then a devise to *A.* for life, "and after his decease to the heirs of his body, not only "*might* but *must* be construed an estate in strict settle- "ment." This is a strong case for us.

(*l*) 4 *Burr.* 2579.

After the British courts have thus restrained the operation and weakened the force of the rule in *Shelley's* case, I can scarcely presume that its influence will be reestablished in this country, as the artificial ground upon which it stood there never did exist here.

The case of the *Attorney General v. Sutton*, is not, I presume, intended for the single purpose of supporting the authority of the rule in *Shelley's* case; but is cited as an authority generally favouring the plaintiff's claim. If that be the intention of the citation, it certainly can have no application to the case before the court.

The words in the cited case, *ex vi termini*, created an estate tail. In *Ginger v. White*, before cited, it was clear that all the sons of *Thomas* were intended to take; nay, all his issue, although only a part are provided for in express terms. But in the case at the bar, all the children being by express terms provided for, nothing is left for implication; and the words of the will may be adopted in its construction without doing violence to any supposed intention. This distinction is fully illustrated by all the cases, where

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the limitation has been to all the males, and then the females, in succession, after the estate for life in the ancestor; as was the case in *Fell v. Fell.* (*m*)

The principle of decision in the *Attorney General v. Sutton*, is likewise adopted in *Langley v. Baldwin*, where the words were the same, except that in the latter case the limitation extended to the sixth son, but not to all; for which reason, and because it was declared that if the devisee for life should die without issue, the estate should go over, in order to provide for a seventh or other son, the devisee was held to take an estate tail.

(*m*) See Cha. Ca. 173. *Backhouse v. Wells*, *Gilb's* Cases 20. 129.

And, again, when the provision was general for the issue or children by the same words, or words of the like import, as they respected the devisee, he was held to take an estate for life. (*n*) A numerous train of ancient authorities might be cited in support of this distinction, and to *this* I therefore hold the distinction between a general limitation to all the children, and a limitation the 1st, 2d, 3d, sons, &c. to be important to apply to this case; *Archer's* case also applies. And to take us out of the authority of *Roy v. Garnett*, the cases of *Goodright v. Pullen*, and *Bale v. Coleman* may be considered together. The limitations in both are expressed in such a manner as to create *ex vi termini* estates tail. *Willes' Repts.* as before cited.

(*n*) *Doe v. L. Mulgrave*, 5th Term Repts. 320. *Lowe v. Davies*, 2nd *Ld. Raymond*, 1561.—*Lodington v. Kime*, 1 *Ld. Raymd.* 203.

As to that part of the adjudication relied on by the counsel for the appellant where it is said "a devise to *A.* "for life and after his decease to his issue, without more, "will carry an estate tail to *A.*;" it is merely a repetition of the 1st rule in *Wild's* case, before cited, and of the old rule in *Shelley's* case.

In the case of *Trevor v. Trevor*, the words *heirs male* are used. This case, therefore, may be replied to as the former.—It may be added, that in it we find another rule in destruction of the principle in *Shelley's* case, to wit, that principle is departed from in settlements in consideration of marriage. Why this distinction in favour of intention, as it is laid down in *Fearne's* Cont. Rem. pa. 124, should have effect in cases of marriage settlements and not in wills, both of which in a legal view are made on consideration and supposed to be for value, I have not been able to trace any satisfactory reason. That the rule in *Shelley's* case, (although so arbitrary as to govern without any existing reason for it) is weakened by this acknowledged principle, of construing marriage conveyances in strict settlement, I strongly contend; because there was nothing originally in the rule in *Shelley's* case, when it was sup-

ported by a semblance of reason, which would necessarily, when marriage settlements became legalized, make them an exception to the operation of that rule, more than devises would be made.—But devises were at first construed differently, for reasons which never existed here.

As to *Lewis Bowle's* case, (*o*) it was a limitation to their 1st, 2nd, and 3rd sons, and not to their other children in succession; it is therefore similar to the case of the *Attorney General v. Sutton*, *Roy v. Garnett*, &c. and may be answered in the same way.

(*o*) 11 Co. 79.

Garth v. Baldwin, (*p*) was the limitation of a trust estate, to *E.* for life and to the heirs of his body, therefore Lord *Hardwicke* decreed an estate tail to *E.*, for he laid down the ground of his decision in these words: "He "was not, in a court of equity, to overrule the *legal con-* "*struction* of the limitation, unless the intent of the testa- "tor or authour of the trust appears, by declaration, plain; "that is by *plain expression* or *necessary implication.*" It was therefore, I presume, that Lord *Mansfield*, in *Long v. Laming* cited this case, and to show how far a court was authorized to carry intention even in opposition to the rule of law. This authority is therefore relied on in the answer to that of *Goodright v. Pullen*, as well as to the case of *Langley v. Baldwin.*

(*p*) 2 *Vezey*, 464.

Lord Chief Justice *Willes*, in the year 1745, (*q*) makes the following observation on the last mentioned case. "The case of *Langley v. Baldwin*, 1 Eq. Ca. Abr. 185, "*is like no other case*, and therefore it is no authority."

(*q*) *Willes'* Rep. 595.

Doe v. Reason, or *Bernard* and *Fenton v. Reason*, is a case mentioned by counsel only, in 3 Wils. 242, where it appeared that the words were *issue of the body;* therefore within the principle of the cases before replied to. So was *Coulson v. Coulson*, No. 10, in the arrangement of cases made by the counsel for the appellants; and No. 11, *King v. Burchell*, as mentioned, in *Long v. Laming*, by counsel. No. 12, *Allason v. Clitheron* was also held an estate tail by implication, by reason of the words *issue of his body.* No. 13, *King v. Melling*, the words are *issue of his body lawfully begotten.*

From the case of *Robinson v. Robinson* little light is produced on the subject. The certificate of the Judges in itself furnishes no rule for the determination made. It was said it was necessary to construe the estate given to *L. H.* an estate tail, and to this construction the words were not opposed, because they were proper to create an estate tail. They were, "*lawfully to be begotten.*" The

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words of a will are to be construed in their legal import, unless that will do violence to the manifest intent; but here the intent was favoured by it, and it seems to me that the obvious reason of the Court's opinion was, that the devise over was void, the limitation being of a contingency on a contingency, which could not be allowed. The only way then by which *the issue* of *L. H.* could take the estate, and the manifest general intention be preserved was by giving *L. H.* an estate tail.

The case of *Dodson v. Grew.* The words of the limitation in this case were, "*to the issue male of his body lawfully begotten.*" The most proper words which could be used to create an estate tail.

The whole of the reasoning employed in discussing the former cases cited by the opposite counsel is brought fully to operate upon this case.—It is an estate tail *ex vi termini*, and the words will have their legal import and effect, unless there is a plain and apparent intention to the contrary: but here, as in the case of *Robinson v. Robinson*, the intention favoured the legal construction.

The supposed analogy then does not exist in the operative words, but in the unimportant circumstance of an equal number of persons.

When the counsel for the appellants comes to class and marshall his cases, we find there is not one referred to, where the limitation has been in the words of the devise before us, "to *the children* of the devisee for life;" but all the cases contain words indicative of an estate tail. The argument of an estate for life by implication from the words, "without impeachment for waste," &c. cannot go further than the express limitation of an estate for life, and therefore need not be remarked on, where cases have been answered in which express estates for life were created.

It is then contended by the counsel, that *Wm. Carr* the devisee took a fee conditional at common law. I believe it might be safely admitted that a conditional fee was executed in *William.* For if the condition never happened in the life of *William*, he could not be said to have been seised of an estate of inheritance; and of none other could his widow at *common law* be endowed.

Next it is argued, "that the word 'children' was intended to designate the inheritance, rather than any particular person to take, because the testator has added no "words of perpetuity." The testator was a merchant of eminence, he had been at great pains to acquire an estate;

was very conversant in all the forms of conveyancing, and versed in the land titles of this country; he was a magistrate, and was said to be an able and learned one. He has, in his own hand, written a testament, which for legal accuracy of expression, may perhaps defy the criticisms of the ablest lawyer; and yet, it is suggested, that he did not know of the existence of one of the most important laws in the transmission of property ever made in the commonwealth in which he lived; although that law was in force for several years before his death. But that when he words his testament in unison with the established principles of that law, (which does not require a perpetuity to be created in express terms,) he does not know of, or mean to introduce the influence of that law, but is in search of some new and unheard of mode to give a perpetuity, by the introduction of the word *children;* and thus (by an evasion, if effectual, almost too subtle for the distinguishing sense of a lawyer,) to create an estate tail, in spite of a positive law of the commonwealth, and in contradiction to all the rules of construction which have been adopted by British Jurists in creating estates of that kind.—This is indeed putting the will of the testator to the torture.

But it is said a conditional fee at common law is created "because the testator has not used words of restriction "to confine the estate for life, as he would have done if "he had intended it."

Surely after he has given the estate in express terms for life, and further declared what was to become of it after the death of the tenant for life, we cannot doubt about his intention as to the certainty of a life estate, or that to have said more would have been, at least tautologous and unnecessary.

If the counsel, in one of his reasons for the supposition that a fee conditional at common law is created, means to say that the testator meant to vest an inheritance in the children of *Wm. Carr*, I concur with him; but contend that those children would take by purchase:—they would take an estate of inheritance without the addition of what were called words of perpetuity—which were then dispensed with by Act of Assembly.—As to the peculiarity of the words in the devise to *William* and his children, I can entertain no doubt but they would receive the same construction with the devise to *John* or *Betsey*, which in express terms, refers to the children only which shall be living at the time of the death of the devisee for life.

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After having in this cursory manner noticed the various reasoning of the counsel on the operation of the words of the will, I come now to reply to that which is more important: the inquiry into the intention which is manifested by the will:—and it is said that unless *Wm. Carr* the younger be construed to take an estate tail, it may happen, that the remainder may go over to those to whom it may be devised, although *Wm. Carr* might still have remote issue of his body. This principle I know has been argued from in England, and in this country in the case of *Roy v. Garnett.* If the position be true, that "children" is a word of doubtful import, and may, to effectuate the intention of the testator, be construed to extend to remote descendants, there is no difficulty; for according to the argument of the counsel himself, although the immediate descendant of *William Carr* the devisee might die in his lifetime, and leave a child or children, the grandchild would be denominated by the term child or children, and would take the remainder immediately on the death of their ancestor the tenant for life, yet it would seem sufficient to oppose the supposition of the counsel of this remote chance of inconvenience, and this violence to the testator's intention, by the immediate and unavoidable inconveniences that would result from construing the will in such manner as to vest an estate tail in *William Carr* the devisee; which *eo instanti our law* converts into a fee simple, and thus, at once, destroys the testator's intention.

On the supposition that the testator knew that there was such a law in existence as would convert estates tail into fee simple estates, we cannot suppose he intended to create a fee tail; because it would be no more than giving to his son a fee simple, which he might immediately dispose of, and so destroy the remainders both to his children and the other children of his testator.

To suppose a fee simple in *William Carr*, the devise must be construed to be an executory devise: but if a limitation of an estate can be construed to be a contingent remainder it never shall be construed an executory devise.

As to what constitutes a contingent remainder, and to show that this case comes precisely within the description, I refer to 2 Bl. Comm. pa. 169; where it is said, "If *A.* "be tenant for life, with remainder to *B's.* eldest son then "unborn, this is a contingent remainder; for it is uncer- "tain whether *B.* will have a son or no." The British authorities say nothing of the general intent, as to the vest-

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ing of the remainder, because, to construe a devise to be an estate tail, the remainder men are provided for; but it is different here; for after a fee simple created by the operation of our act, there would be no remainder.

On the supposition then, that there are two main intents, manifested in opposition to each other; the one to vest an estate in *William Carr's* remote descendants, in case of a non-surviving son or daughter of *William;* the other to vest a remainder in the testator's other two children, and both these cannot stand together, let us adopt the rule of decision mentioned; and suppose the testator had been told, that by a possible event a grandchild of *William* might be disinherited, unless the estate of *William* was made a fee simple. It is at least problematick whether he would not have risked that possible contingency, rather than have left the estate open to the disposal of his son, thereby risking, in another way, the chance of his grandchild ever enjoying the estate: and also of a remainder, or an inheritance from *William* vesting in *John* and *Elizabeth* or their children, according to his express intent. In the case of *William's* alienation, the testator's grandchild would lose the estate, or if he had no grandchild, his own children. To grant then, that a fee simple would be created by implication, would produce the destruction of the main intent contended for; as we have no estates tail. But, in case of the possible event of a non-surviving child of *William*, his great grandchild only could lose the estate, according to the argument of the counsel, still submitting to the risk of an immediate alienation of his ancestor. Yet I am content to remove every obstacle arising from this possible event; to take for true the counsel's own doctrine, that in the limitation of estates *child* or *children* will be construed to mean the same as *issue*, and we shall presently see what must necessarily under our laws be the construction of this will. I shall therefore now consider this case under the second view proposed to be taken of it, to wit; "under the principles which are established and must necessarily flow from a rational interpretation of our laws, altering the system of British law in the disposition and limitation of property."

I have examined the artificial grounds on which some of the rules of limitation were built by the laws of England, it has appeared that those rules by the modern adjudications in England were shaken and in effect destroyed by the operation of the principle of intention in the construction of wills under the Stat. of H. 8th. It would seem

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strange therefore that, in this country, any of the rules of property which were merely incidental to the feudal system should be revived, when that system is totally abolished, and the deductions from it in every instance counteracted by our laws, where such deduction could be the object of positive law. I therefore think it rational at least, and I contend it is consistent with law, that in the interpretation of wills, the intention of the testator, should not be tramelled by obsolete rules of the common law, which, if introduced into operation, I shall endeavour to demonstrate would defeat the spirit and meaning, and perhaps counteract the expressions of our municipal regulations.

I say that it is impossible that the rules of limitation established by the common law, can apply in the construction of wills under our Act of Assembly. By our laws an estate tail can in no case be created, which will not *eo instanti* become a fee simple. (*r*) We cannot recognize any estate of an intermediate gradation between a life estate, and a fee simple. All the constructions then, which have been so much laboured, to show, that a court will preserve the estate to the issue of the donor according to his will, must fail, except the acknowledged rule that they may take in remainder as purchasers. If it is an estate of inheritance, it is now by the laws of this country free to alienation in common form, and although estates tail might be barred in England, yet, in contemplation of law, they were considered, as conveying a limited interest, through a particular channel.

(*r*) 1 Call. 165.

We learn from the old books that the reason why the courts first established that kind of judicial estate in England called an estate tail by implication, was, to preserve the contingent remainders; namely, when a devise was to *A.* and his heirs; and if he die without issue, remainder over: here an estate tail is implied by the word issue, in order to preserve the remainder over: and there is a case stated, in 4 *Gwyllim's Edition of Bacon* 258, where the court construed an estate in fee simple to be only a fee tail in order to preserve the remainders. For, if it was construed a fee simple, the remainder was gone; it being a contingent remainder, and not an executory devise; the same therefore as our case. If then the courts of England have adopted a rule of construction, by mere implication, for the purpose of preserving the contingent remainders, which has been always adhered to as reasonable, by creating a new kind of estate by implication, surely our courts will be justified in ad-

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hering to the letter and plain meaning of a devise, in affecting the same important object.

For, without construing this a life estate in the first taker, the remainders must be totally destroyed; it being a life estate or a fee simple; and the limitation being a contingent remainder and not an executory devise; and it being decided that the court will not construe that an executory devise which is a contingent remainder for any purpose whatever. (*s*) The words used by the testator in limiting a life estate in express terms, and a reiteration of those expressions; his defining what was to become of the estate after the determination of the particular estate; his having branched his estate into three parts, and limited the remainders in the same way, showing the forethought and steadiness of his purpose; his having created cross remainders in those three branches of his estate in express terms; his having, in different parts of his will, and especially, in that part where he makes a devise of a contingent remainder to his wife, in express terms distinguished between *the life estate* and the remainders; all these reasons and more which might be here concentrated, from the *words* of the will, (the first rule of exposition, *Bale v. Coleman*, 1 *Peere Williams* 142,) serve without doubt to show that his intention was not to give a fee simple to *William* his son. But, under the grounds of decision, if his intention had been obscure, we might have resorted to implication, to preserve the remainders. Again—To show to what lengths courts of justice have gone in preserving remainders, where they would be otherwise destroyed by operation of law, I might cite the cases of the *Attorney General v. Sutton*, *Langley v. Baldwin*, and many others; and in our own country *Roy v. Garnett*, where estates tail have been created in order to secure a remainder to a 6th, 7th, or 8th son. I might therefore presume a court might adhere to the words, when that adherence will have a better influence in preserving the remainders under the Virginian system of laws. It is said where it appears to be the intention of the testator that there should be a succession in tail, it would defeat that intention, if *all were to vest in the first taker;* pr. Ld. *Mansfield*, in 2 *Burr* 1111.

Finally,

There was no possible way by which the testator could, according to the laws of this state, secure, at the same time, the enjoyment of the estate to his children for their lives, and a remainder to their descendants, but by giving to his children a life estate in the property devised: for estates tail are done away.

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(*s*) Fearne 4th Edit. 420, 421. 1 Call. *Carter v. Tyler.*

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The cases and adjudications before mentioned, show that courts of justice have always considered the preservation of remainders express or implied, as essential to the main intent of the devisor; and I do not understand that this general intent has ever been considered in a point of view subordinate to the intent which is supposed to exist to confine the estate to the issue of the first taker; but that being now rendered impossible, by our act docking entails further than to that life which shall be named and be in existence immediately at the determination of the first life estate, the Court will preserve the other general intent in favour of a remainder man. For by the argument of the counsel it is conceded that, if *William* is construed to take more than a life estate, the remainders are gone; and the estate must pass in a course of descents.

Having stated my opinion of the probable operation of our law of 1776, for docking entails, I will see with what force the case of *Roy*, &c. *v. Garnett*, (*t*) relied on by the counsel for the appellants, applies in contradiction to the principles I have laid down.

(*t*) 2 *Wash.* 9.

In the first place, let it be remarked, the testator in the case of *Roy*, &c. *v. Garnett*, made his will in 1765, and, from the information the case affords, died soon after; so that on the principle, that wills are to be construed according to circumstances at the time they were made, the rules of limitation in England, strictly applied in courts in this country on the subject of that will. Secondly, according to the law of England, *an express* estate tail is created in the first and every other son of *James*;—which differs it in two important points from the case pending; 1st, as the estate is only contended to be an entail by implication, contrary to the express estate for life—2nd, as there is no succession in tail contended for, in the present case, and the child or children of *William*, if any had survived, would have taken in parcenary or as tenants in common in fee simple; as would also the children of *John* and *Betsey per capita*, and not in a course of descents, under our Act of Assembly, as the sons of *James* would in *Roy v. Garnett* by the construction of the stat. *de donis*. Under this second distinction the case of *Roy*, &c. *v. Garnett*, is expressly a decision in our favour, for (in pa. 32,) the President says "the parties have rightly agreed, that "the devise to the surviving sons did not enlarge the "estate for life in *James*, since the surviving sons not "only might, but must, take as purchasers, being to take "not in *succession* but as tenants in common."

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Thirdly, although the doctrines of limitation are only commented on as existing in England, yet no adjudication was made, by which a rule of property might be considered as established; and it was said that the court doubted as to the effect of that devise. I am willing here to admit that it was impossible the court could doubt as to the operation of the rules laid down in the construction of estates tail, whereon a remainder may be limited; I have no where denied the doctrines as laid down by the president. If the doubts of the court had been explained, they might have been found to be derived from the alteration in our system, which at the time of the adjudication was effected by the abolition of estates tail; and in this opinion I am confirmed by the concluding words of the adjudication, denying the operation of the act of 1776, and thereby taking the case entirely out of its influence. This case cannot then be ruled by the opinion delivered in that; the two cases being in circumstances totally dissimilar. The case of *Hill v. Burrow*, does not stand in our way, because, there, the words are said by the court to be *appropriate and emphatical to create an estate tail*—and no words were used designating the termination of the life estate.—So, in the case of *Tate v. Tally*, the words *heirs of his body* were used.

Botts, in reply.—The counsel for the appellees contend that the devisee *William Carr* took only an estate for life; and that to his child or children a *contingent remainder* was devised.

To support the effect given by the appellees to the will, the counsel reason 1st, from the English cases, and 2dly, from the laws of Virginia, which they suppose have altered the law of England as to the subject in question.

Wild's case is cited. The first rule there stated puts "children" and "issue" upon the same footing. If children and issue be the same, it is clear from a large class of concurring cases that, even where the devise is expressly for life, with remainder to the children or issue after the decease of the devisee for life, the latter will take an estate tail. (*a*) The words of limitation to the issue *after the death of the devisees for life* are of no importance in the present question; for, as was properly decided in *Ginger v. White*, those words only proved that the devise to the children or issue was intended as a remainder. Now, in the principal case, it is admitted that the express devise to *William Carr* for life, as well as the words "after his de-

(*a*) See 15 cases cited in *Botts's* first argument collected in class the 3d.

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cease," show an intention to give his child or children a remainder; but then the question is whether there is not in the same will a general intent incompatible with, and overruling that particular intent.

The counsel for the appellees take it for granted that the testator meant to devise to *William*, in the same words and to the same effect that he used and designed in the devises to his other two children, though the words employed in the several devises are substantially different. *William* was the eldest son of the testator; and that circumstance, according to the common prejudice of fathers, may account for the difference made by the testator between the devise to him and the devise to *John* and *Betsey*. It is sufficient that the testator has used different words, and of dissimilar legal import. It is admitted that, in every other respect, he may have intended similitude in the devises to his children; but, because a testator makes but a small difference in the mode of limiting his property to his children, it is not to be inferred, against plain words, that no difference was intended. This reasoning does not conflict with the intention in the codicil to give equal shares of his estate to his children; because that equality had relation to nothing but the quantity of the estate to be given to each without reference to the direction in what manner it was to be preserved in the families of his children, after their deaths. He surely did not intend the house and lot in *Dumfries* given to *Betsey Tebbs* and her heirs, in a separate clause of the will, to vest in her nothing but a life estate; and yet this would be the effect of *Mr. Love's* exposition of the codicil.

If the three devises are to be likened to each other, those to *John* and *Betsey* might as well be moulded to the shape of the one to *William*, as to make the latter accomodate itself to the former. The courts more frequently reject words in a testament than make them for testators.

However, this point is not considered of importance; since, if the devises were the same, the general intent must prevail over the particular intent.

The case most relied on by *Mr. Love*, is *Ginger v. White*. (*b*)

(*b*) *Willes'* Rep. 348.

In that case the court admits that the word children in a will sometimes creates an estate tail; and the Chief Justice expressly declares that there is a distinction between "heirs" and "issue," putting the latter word as meaning the same with children. Now, turn "child" or

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"children" into "issue" and the fifteen concurring cases in class the 3d, before cited, will make the present an estate tail.

It is true that, in the case of *Ginger v. White*, the court decides that the limitation over upon the death of the devisee *John, without issue*, did not turn *John's* estate into an estate tail; but the reason given by the court is that an express estate for life cannot be enlarged by implication. Now, though this was contended for as a principle of law at that time by some of the Judges, the contrary has been finally settled by all the modern decisions upon the subject; and expressly by the case of *Roy v. Garnett* in the Court of Appeals. (*c*)

(*c*) See the 8th Class of Cases in *Butts's* first argument.

The word "heirs," *ex vi termini*, creates an estate in fee: the word "issue" has the same meaning when necessary to effectuate the general intent, and, upon the same reason, "children," *in this country*, must mean the same thing, and have the same effect.

The case of *Fell v. Fell*, stated in *Mr. Love's* argument, has no bearing on the present case. *Thomas Fell* was there in being at the making of the will, and expressly named as a remainder man; but there a limitation in remainder to "the females" created in the first female an estate tail. It is submitted whether "child" or "children" is not equivalent to "the females?"

In *Ginger v. White*, a case from *Moor* 397 is cited, of a devise to *A.* for life, and, after his decease, to "the men children of his body;" and adjudged that *A.* took an estate tail. The law of this case is no where denied, and it is submitted whether "child" or "children" are not words as strongly importing an inheritance as "*men children of the body.*"

The counsel for the defendant cannot be successful in his attack upon the rule in *Shelley's* case. That rule has never been impugned in any case. If *Mr. Love's* quotations prove any thing, it is that there is no more legal virtue in the word "heirs" than there is in "issue;" for, if there be not a general intent to secure an inheritance, neither of those words will effect it; but, if there be such general intent, either of those terms, or the word "children" will carry the inheritance.

The case of *Doe v. Ld. Mulgrave*, (*d*) and the other authorities cited by *Mr. Love*, according to his exposition of them, prove too much;—viz. that, when the provision is general for the *issue* or children of the devisee, he is held

(*d*) 5 Term Rep. 320.

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to take only an estate for life. If this be true, the fifteen cases in class the third, already noticed, are at once overruled.

In the argument of *Mr. Love*, he hints at a distinction between "children" and "issue;" and labours effectually to show that "issue" is not a word of limitation, except where the general intent shall make it such; and, surely, he will not deny this qualified effect to the word "children." He has not said that "children" are not "issue," or that "issue" means other than "child" or "children," either philologically or technically.

Among the notes to the case of *King v. Melling* is one that the words "and for want of such issue" make a phrase suitable to an estate tail. Now, in the case to be decided, there is a limitation over for the want of issue. When the testator says "and if all my children die without issue" he furnishes that strong implication of an intention to provide for all the issue which has, in all the cases where this implication is found, carried an estate tail.

When *Mr. Love* comes to the case of *Dodson v. Grew*, he supposes the words "to the male issue of his body lawfully begotten" to create an estate tail, *ex vi termini*. He then argues that "issue" is a word of *limitation* or of *purchase* according to the general intention; and the word "heirs" has been found a word of *purchase*, according to the general intent. The general intent, *Mr. Love* has effectually contended, must control and subdue the strongest terms and phrases of limitation: now I cannot understand how it is, that the general intention of the testator in the case to be decided should be the same as that of the testator in *Dodson v. Grew*, as to the end of preserving the estate for the remote descendants of the first devisees, and that those intentions are to govern, without producing the same result. In *Dodson v. Grew* the limitation was to the male issue; and, in the case to be decided, the intention was to provide for both male and female issue; and in that the cases differ. The words lawfully begotten in *Dodson v. Grew*, restricted the limitation to be legitimate issue; but the law would have interposed that restriction; so that those words were redundant. Legitimate issue in England was the only inheritable issue.—Here illegitimate issue may be capable of inheritance by adoption. But these are things that influence nothing but the course of the inheritance without effecting the *existence* of the inheritance. The case of *Cook v. Cooper* was to *R. C.* for the term of his natural life *only*, and, after his decease,

to his issue *as tenants in common*. In this case, *R. H.* could never have taken an estate tail, as he did, if terms excluding the female issue;—restricting the issue to such as were of his body, or to those lawfully begotten, were necessary.—

It is to be remarked, that the counsel for the defendants have not attempted, otherwise than in an oblique way, to answer my argument drawn from a comparison of the case now to be decided with the case of *Dodson v. Grew*.

It is still more remarkable that my argument upon the implicative branches of the devise, and upon the incompatibility of the particular with the general intent, on which I most relied has been passed without any direct attack. I infer that the cases there cited, and the reasoning there taken from the books are admitted to apply, and cannot be resisted. If "child or children" will not carry the inheritance, we have the word "issue;" and the competency of that to carry an inheritance is admitted by *Mr. Love* himself.

Mr. Love seems to admit, if his construction of the will should prevail, that it was incompetent to provide for all the descendants of the devisee *William*.—Indeed, he contends, "if *Wm. Carr* the devisee had died, leaving grandchildren, but no living child, that those grandchildren could not have taken the estate. This is certainly true, if *William* did not take an inheritance; and therefore all the cases (including *Roy v. Garnett*) expressly declare that the first devisee shall have the inheritance as the only means of casting it on the grandchildren and remote issue.

It is said by *Mr. Love*, it might be safely admitted that *William Carr* took a fee conditional at the common law; for, said he, the condition did not happen, and therefore *Wm. Carr* never had a fee tail or absolute fee simple. *Mr. Love* wholly forgot that the act of 1776 amended by the act of 1785 (see Rev. Code last edition, page 158, sect. 9.) had expressly discharged these estates of the conditions, and declared them absolute fee simple estates.

It is next contended, that although the estate might, in England, be construed an estate tail to effectuate the general intent, yet to construe it here an estate tail would not effectuate the general intent; because the Act of Assembly immediately turns it into a fee simple, which does not answer the general intent.

It may be true that the operation of the Act does thwart the general intent in some degree, but not alto-

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gether; for the general intent is better fulfilled by leaving the estate to descend to the issue, in case the devisee does not alien, than by robbing the issue of it, at all events, as will be the case if the first devisee take only an estate for life. The issue might be barred in England too by alienation through "fine and recovery."

But this question so laboured by *Mr. Love* has been closed forever by as well the legislature as the Court of Appeals.

First, the legislature hath declared that every estate in lands which hath been limited, or hereafter shall be limited, so that, as the law *aforetime was*, such estate would have been an estate tail, shall also be deemed to have been, and to continue an estate in fee simple." Act of 1776, amended by the act of 1785, (*e*) so that, if, *as the law aforetime was, this would have been an estate tail, the law is express that it shall now be a fee simple.*

(*e*) Rev. Code chap. 90. sect. 9, pa. 158.

Mr. Wickham has urged the same matter that *Mr. Love* has, in two cases before the Court of Appeals, (*f*) with great zeal and ability, and in both instances he was expressly and unanimously overruled; the court in each case declaring that the Act of Assembly was conclusive. Indeed, the law upon the subject had been settled in the general reasoning of the court in the case of *Carter v. Tyler.*

(*f*) *Hill v. Burrow*, 3 Call, 342. and *Tate v. Tully*, 3 Call 354.

In resuming the discussion of the case of *Roy v. Garnett*, *Mr. Love* says, all the children that *James* might have were not provided for, without giving an estate tail; and in the case to be decided the children *are* all provided for. Now, a provision for all the children is creative of an express estate tail; and, instead of weakening, strengthens the implication.

Again, *Mr. Love* says, the children of *William* would have been tenants in common under the limitation to the child or children. In *Cook v. Cooper* before cited, the limitation was to the issue of the tenant for life "as tenants in common;" and yet the estate was adjudged to be a fee.

Mr. *Love* seems to admit that the issue of *William Carr* the devisee could not take by way of executory devise; and the case of *Carter v. Tyler*, in 1st *Call's* Reports, (without going further) proves his correctness. Now, if they could not take by way of executory devise, they could not as contingent remainder-men, they not being *in esse.*

Williams, on the same side. It has been correctly stated by counsel that the single question is, whether *William Carr* the younger took an estate for life or a fee. If a fee,

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then the decree of the Chancellor dismissing the bill must be reversed.

In viewing this case, I will first consider it, as if it were now to be decided in *Westminster-Hall;* and secondly, I will inquire whether the Acts of Assembly of Virginia have made any difference in the rules of construction.

The rules which have been adopted, in construing wills in *Westminster-Hall*, are;

1st. That the intention of the testator shall prevail, if it be not contrary to the rules of law.

2d. That where there is a general and particular intention manifested in a will, and they cannot be reconciled, the particular intention must yield to the general.

3d. That the intention must be gathered from the will itself.

4th. That no subsequent event can vary the construction of the will; but it must be the same in every event.

5th. That no exposition shall be given which will tend to a perpetuity.

Another rule was, indeed, added by *Mr. Wickham*, "that wills shall be construed according to the existing "laws of the country, in which they are made." This I shall notice, when I come to consider the operation of our Acts of Assembly.

Having premised thus much, I come to consider what estate *William Carr* the younger took under the will; whether an estate for life or in fee: if the former, the Chancellor's decree is right; if the latter, it is erroneous, and the complainant is entitled to dower. In doing this it will be important to examine the different clauses of the will which relate to the devise in question.

The testator first devises to his son *William Carr* the estate which is the subject of the present controversy, *during the natural life* of the devisee, and after his decease to his child or children; *if none*, remainder to his other son *John Carr*, &c.—He then declares his intention to be, that all his dear children should have an equal share of his estate; and, finally, he provides, that, *should all his dear children die without issue of their bodies, his dear wife living*, one half the life estate should go to his dear wife, remainder over, &c. So that the testator has manifested his clear intention to make all his children equal, and that the estate should not go out of his family until there should be an indefinite failure of issue in all his children.

If this case had occurred in England, the words *child* or *children* would, upon the face of the whole will, be ex-

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pounded to be synonymous with the word *issue*. On this point I shall refer to one of the authorities cited, by Mr. *Wickham;* 3. Term Rep. 484. The page to which I wish to call the attention of the court, is 493, in which Judge *Buller* says, that *children* and *issue* have the same meaning. The same doctrine will be found in 2 *Fonblanque* chap. 3, sect. 3, and 2 *Lord Raym* 1437. This is done to effectuate the plain and manifest intention of the testator.

If the words *children* and *issue* mean the same thing, and which is proved by the authorities above referred to; it remains to consider whether a devise to a man for life remainder to his children, be not an estate tail. If so, it follows as a necessary consequence that *William Carr* took an estate of inheritance. The will should be read, as to *William Carr* for life; remainder to his children; and, if he die without issue, remainder over. Such a devise in England would be deemed a strong estate tail.

Shelley's case, in the 1 Co. 89, is a much stronger case in favour of a life estate, yet it was determined not to be a life estate in *Edward Shelley;* even though it was limited to him for life; remainder to his heirs males of his body, and to the heirs males of such heirs.

(*g*) 2 Ld. Raym. 1437.

The case of *Goodright v. Pullen* (*g*) is also a stronger case. The Judges, in giving their opinion, were unanimous that the devisee took en estate tail. It was moreover said, that *issue* was sometimes a word of limitation, sometimes of purchase; according to the penning of the will. If my position first laid down, that *issue* and *children* are the same, be correct, then it follows that *William Carr* the younger took a fee tail.

(*h*) 2 *Stra.* 1125.
(*i*) 1 *Burr.* 38.
(*k*) 1 *East* 229
(*l*) 2 *Wash.* 9.
(*m*) 2 *Wils.* 322.

The cases of *Coulson v. Coulson*, (*h*) *Robinson v. Robinson*, (*i*) *Cook v. Cooper*, (*k*) *Roy v. Garnett*, (*l*) and *Dodson v. Grew*, (*m*) are all stronger than the case at bar. In every one of those cases the testator meant to provide for the remotest issue. In the case at bar, *William Carr* the elder intended that his children should be equal, and manifestly intended that *William Carr's* family, as long as he had a child or issue, and they had children or issue, should be provided for, in exclusion of every other person.

The court is first to consider what estate *William* would have taken before the Act of Assembly. If he would have taken a fee tail, then by the operation of the act it is converted into a fee simple. It is unimportant with us in which light it is considered. According to Mr. *Wickham's* argument the estate for life to *William* merged in the fee until a child should be born; there being no intervening

trust estate to prevent it. Let it be admitted, then, that *William* took an estate tail, to be devested only by the birth of a child. In this case the testator evidently meant to provide for the issue of *William*, as long as any descendant of his should be alive. We ought therefore to adopt that construction which will best effectuate that object.

But let us suppose, for the sake of the argument, that *William* took only an estate for life. What would be the result? If he had had a child or children, they would have taken only an estate for life, (if the case had occurred in England,) because there are no words of inheritance. This would frustrate the general intention of the testator; because he declares that, should all his children die without issue, the estate should pass to others specially named: thereby manifesting a plain intention to provide for the case of an indefinite failure of issue; which has always been held to pass a fee tail.

It is said by *Mr. Wickham* that "children" is a word of purchase in this case, because the testator intended they should all take together. The testator uses both the words "*issue*" and "*child:*" and his intention was, that the estate should go to the child or children, or to the issue and the heirs of that issue. Yet that would make it an estate tail.

The case relied upon from 3 *Term Repts.*, to show that *child* is a word of purchase, has no application. In that case the testator evidently showed his intention to be, that the children should take as purchasers. There the estate was to go, in remainder, to the children of a woman by a particular husband, as tenants in common; and words of inheritance were superadded, which is not the case here.

If this case had been before a court in England, and *Mr. Wickham* be right, the children of *William Carr* would only take an estate for life; but, if I am right, they would succeed to an estate tail.

But it is said, that in England, this would be an estate tail in *William*, to be devested on the birth of a child. If so, he had an estate for life; remainder to his children for life; remainder to himself in fee tail; or, in this country, in fee. Admitted: for, according to *Mr. Wickham's* argument, the life estate merged in the fee, until a child should be born. As that event never happened, he died seised in fee, and consequently the appellant is entitled to recover.

In England this will would be so expounded, that none of the family of *William Carr* should be disinherited. Yet,

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according to *Mr. Wickham*, if *William Carr* the younger had had a child, and that child had had issue, and died in the lifetime of *William*, that issue could not take; because the description must be completely answered to enable the devisee to take as a purchaser.

If then in England, *William Carr* the younger, would have taken an estate tail, let us examine whether the Acts of Assembly have made any change in the rules for expounding wills. The first Act to which I shall call the attention of the court is the Act of 1785. (*o*) This Act declares that every estate limited, so that, *as the law aforetime was*, it would have been a fee tail, shall be deemed a fee simple. What would this estate have been *aforetime;* that is, prior to the Acts of 1776 and 1785? If I am right, it would have been an estate tail in *William;* which by this Act is converted into a fee simple. This mode of construction the court is understood to have adopted in *Tate v. Tally*, (*p*) and to have decided upon the Act of 1785, as if that of 1776 had never been made. In that case, *Mr. Wickham* contended that a new rule should be adopted; but the court thought otherwise, and considered the Act of 1785 as a correct exposition of the Act of 1776.

(*o*) Rev. Code, ch. 90, sect. 9, pa. 158.

(*p*) 3 *Call*, 354.

But take the case upon the Act which declares that words of inheritance need not be superadded. (*q*) Still *Wm. Carr* took a fee. A devise to *A.* for life, remainder to his heirs, would, in England, be a fee in *A.;* upon the universal rule that where a freehold is given to the ancestor, remainder to his heirs, in the same instrument, the ancestor takes a fee.* Here the testator gives the estate to *William Carr* for life, remainder to his children. The law of descents declares that the children by that name shall be his heirs: for, in this country, "children" is a more apt word to create an estate in fee simple than "heirs" or "issue;" the law of descents using the term *children* throughout. A devise, in England, to *A.* for life; remainder to his *heirs;* would give a fee; the word *heirs* being an apt word of limitation; and, according to the rule of law, the two estates would be merged. In this case the devise is to *William* for life, remainder to his *children.* If the word *children*, in this country, is as apt as the word *heirs* in England, then the court will give them the same construction.

(*q*) See Rev. Code, ch. 90, sect. 12, pa. 159.

The rule that title by descent is the more worthy, equally applies in this country. Thus, if a person devise

* See 1 *Day's* Cases in errour 299, *Bishop v. Selleck.*

to his *children* generally, they would take by descent; because we cannot change the law. The case in *Salkeld*, (r) cited by *Mr. Wickham*, to show that parceners in a devise take by purchase and not by descent, will not bear him out. In that case there were two parceners, and a devise of the whole estate to one; it was adjudged that he took by purchase. He could not take as heir: *first*, because the two make an heir, and not one; *secondly*, if a moiety had descended to the parcener who was the devisee, the other parcener would have been entitled. This case shows that if the devise had been to the parceners, in the same plight as they would have taken by descent, they shall take in that way.

(r) See 1 *Salk.* 242.

But it is contended, that the court must change the rules of constructions in wills because of the Act of Assembly docking entails. This is answered more ably by the opinions of the Judges in *Tate v. Tally*, (s) than by any argument which I could urge. There they affirm the doctrine that the rules of construction are to be the same as before the Act. *Mr. Wickham*, sensible of this, stated another position: he admitted that *William* took an estate tail, subject to be devested by the birth of a child. What does this prove, but that he took a fee simple, under the operation of the Acts of 1776 and 1785? And, no child having been born, he died seised of a fee, and his widow was dowable of the estate.

(s) 3 *Call*, 354.

It is said by *Mr. Wickham* that the court will reject all artificial rules of construction, and look only to the intention of the testator; and that the will should be so expounded as to effectuate that intention; not to defeat it. This is bringing the argument in a different shape to the former position, that the court will adopt a new rule of construction. In the cases of *Tate v. Tally*, and *Hill v. Burrow*, the same effort was made; but the decision of the court, it was presumed, had forever put the question to rest.

Having endeavoured to show, upon English authorities, that *William Carr* would have taken a fee tail; and that our Acts of Assembly do not change the rule, I will beg leave to inquire what was the intention of the testator upon the face of the will itself. The object of the testator was not merely to provide an estate for *William* during his life, but for his most remote issue. This could not be effected, unless my rule of construction should be adopted: for, to take as a purchaser, the person must answer the description in all its parts; *grandchildren* not answering

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the description in the will, the estate would have gone out of the family.

If then I have shown that, in England, *children* would have been considered a word of limitation, in order to effectuate the general intent; in this country, the rule should be the same, according to my view of the Acts of Assembly. 1st, Because, prior to 1776, this would have been adjudged a fee tail in *William*. 2dly, Because, by expounding the will so as to make the children take as purchasers, the grandchildren would have been excluded, if any. 3dly, The testator, if he had been asked, would certainly have declared that such was not his intention.

(t) 1 *Call*, 212.
(v) 2 *Call*, 72.

The cases of *Brewer v. Opie* (t) and *Selden v. King* (v) do not apply. In the former, there was no estate whatever vested in the ancestor, and the word *children* was, according to a well known rule of law, considered a word of purchase. The difference between a devise to a *stranger*, and to the *ancestor* with remainder over has been long settled. In *Selden v. King*, there was a clear intention in the testator to give an estate to his wife for life; remainder in tail to the child; whether a son or a daughter. The child could not take by descent, but must take by purchase. The rule is well settled that, where the estate is given to a different person from the one who would be the heir, the devisee takes by purchase.

By adopting my rule of construing the will, the testator's general intention would be effectuated by providing for the remotest issue of his son, and every part of the will would stand together. I should read the will thus: I give to my son *William Carr* (certain lands) for and during the term of his natural life; and, after his death, remainder to his issue: but, if he die without issue, then to *John Carr* and *Betsey Tebbs*, &c. But if all my dear children die without issue, remainder over. My will and intention is, that all my dear children shall have an equal share of my estate. To read the will thus, would effectuate the manifest object of the testator: and this is the only mode by which all parts can be reconciled.

But, if I am mistaken, and the exposition of *Mr. Wickham* be adopted, that *William* took an estate in fee tail subject to be devested upon his having a child, as that event never happened, he necessarily died seised of such an estate, whereof his wife could be endowed; and therefore the decree of the Chancellor must be reversed.

Curia advisare vult.

Saturday, *June* 20th. The Judges delivered their opinions.

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JUDGE TUCKER. The question which the Court is now called upon to decide, is upon the construction of the will of *Wm. Carr* the elder; wherein the testator, by express words, devises an estate for life to each of his three children, with remainder to the children of each, and in case of the death of either without children, remainders over to the survivor or survivors of his own children.—The particular clauses relative to his son *Wm. Carr* Jr. are thus stated:

He gives to *William Carr* sundry tracts of land, and among others, one recovered of *T. Mason's* executors; and, after the death of the testator's widow, *Aga*, and her children, *during the natural life* of the *devisee;* and, *after his* decease, to his *child* or *children;* if *none*, to his son *John Carr*, and his daughter *Betsey Tebbs* for *life;* and then to be equally divided between their children. And by a codicil he declares, that should all his dear children die *without issue* of *their bodies*, his wife still living, one half of the *life estate* to go to his wife during her natural life, with remainder over, &c.

The cause has been ably and elaborately argued by the counsel on both sides. On the part of the plaintiff, it is contended that *William Carr*, Junior, took an estate of inheritance, of which his widow, one of the plaintiffs, might be endowed, by virtue of the above devise; according to the rule in *Shelley's* case, that whensoever the ancestor, by any gift or conveyance, takes an estate for life, (though limited by any restrictive words whatsoever) and, after, in the same gift or conveyance, a limitation is made to his *heirs*, in fee, or in tail, the heirs shall not be purchasers; (1 Co. 99.) and it makes no difference where the law creates the estate for life, or the party; or where there is an intervening estate; especially, if not of freehold; (2 *Fonb.* 70, 71.) and this rule we are told has never been shaken. 1 *Brown.* 216.

To establish the application of this rule to the present case, the counsel for the plaintiff have adduced a number of cases where the limitation over has been made to *issue* of the first taker; in which he has been adjudged to take an estate tail, according to the rule in *Shelley's* case: and then, reasoning by analogy, they contend that, as the words "*issue*" and "*children*" both mean the same thing, in a *natural* sense, they are to be taken as meaning the

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same thing also in a *technical* sense; and hence infer, that whenever an ancestor takes an estate of freehold, and, in the same will, there is a limitation over to his *children*, the children shall not take as *purchasers*. In other words the estate so limited shall be construed to vest an inheritance in the first devisee, whatever words the testator may have used to show he meant to give an estate for *life only*. That the words "*heirs*," "*issue*" and "*children*" are not synonymous, must be known to every man the least conversant with legal distinction. By the common law a conveyance to a man and his *heirs*, gives him an estate in fee simple, the highest estate in lands that a subject could have: one to him and *his issue* would only create an estate for life; to him and his *children*, if he had any at the time, would have created a joint tenancy with them for life only. (2 Bl. Com. 115, 6 Co. 17.) Again, the word "*heirs*" is a mere term of art to designate the persons to whom an estate in lands should, either immediately, or remotely, descend; and, as it respects real estate, must, when not explained by other words, or by the context, always be understood in a technical sense and no other. The word *issue* in a will is either a word of purchase or of limitation, as will best effectuate the intention of the testator; it is sometimes singular, sometimes plural, sometimes a word of limitation, sometimes of purchase; but must always be construed according to the intention of the will or deed wherein it is used; and it is said to be a rule, that, where an ancestor takes an estate of freehold, if the word "*issue*" in a will comes after, it is a word of limitation; (2 *Wilson*, 324.) and then it always means *heirs of the body;* that is, the first, second, third, fourth, or tenth *son in succession*, one after another, or the first, second, third, and tenth *daughter collectively*. The word children is not a word of art; it has a *natural* sense, in which it is most generally used; when applied to the remote descendants of any person, it is altogether a figurative expression; thus we read of the children of *Seth;* the children of *Ham;* and the children of *Israel*. In the latter instance it is used to designate a whole nation. But, when not used in this figurative sense, it means the immediate offspring of a man or woman; it has indeed, in a few cases been construed, to mean *grandchildren*, (1 Ves. 196.) and even *great-grandchildren*. (Ambler, 555. S. C.) But this construction is to be admitted only where *no other* construction can be made. (4 Ves. junr. 698.) I have met with no case where, in a devise by way of remainder, the word

children hath had the same sense affixed to it, as *heirs of the body;* that is designating them as takers of an estate of *inheritance* in *succession*. Here the analogy between the words "*issue*" and "*children*" seems to fail. The former, according to *Gould, Justice*, (2 *Wilson*, 324.) is used in the statute *de donis* promiscuously with the word *heirs;* a strong reason for the technical sense which it has obtained; it comprehends, according to the same Judge, the whole generation, as well as the word *heirs;* and, in his judgment, it is more properly, in its natural signification, a word of *limitation*, than of purchase. The same has certainly never been said of the word children. On the contrary, where a devise was to *John White*, for life, (he then having no children,) and from and after his decease, or other determination of his estate, to the male children of the said *John successively*, one after another, as they are in priority of age, and to their heirs, and, in default of such male children, to the female children of the said *John*, and their heirs; and, in case the said *John* should die *without issue*, remainder over to the testator's grandson in fee simple; the Court of Common Pleas decided, after five several arguments, that *John White* took only an estate *for life*, and not an estate tail. (*Ginger v. White, Willes'* Rep. C. p. 348). Much has been said as to the rules of construction in the case of wills. There is one general rule, equally for Courts of Equity and for Courts of Law, applicable to all wills; which the Courts are bound to apply, however they may condemn the object. The intention is to be collected from the whole will taken together. Every word is to have its effect. Every word is to be taken according to its *natural* and *common* import; and, if words of art are used, they are to be construed according to the technical sense, unless upon the whole will it is plain that the testator did not so intend. (4 *Ves.* junr. 329); and by the late President of this Court, in the case of *Kennon v. M'Robert*, it was said, "if the testator use "legal phrases, his intention should be construed by *legal* "rules; if he use those that are common, his intention "according to the common understanding of the words "shall be the rule." (1 *Wash.* 100.) The same enlightened Judge hath told us, "that the intention of the testator is "to give the rule of construction, is declared by all Judges "both ancient and modern; and *Lord Holt* and some "others more modern, emphatically call that intention the "polar star which is to guide our decisions." (1 *Wash.* 102.) Adopting the testator's intention in the present case,

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as the cardinal point by which we are to be guided, can we fail to discover that his primary and general intention, which pervades his whole will, and is confirmed by the context in every part of it, was to give to each of his children a *life estate only*, in the property respectively bequeathed, or devised to them; with contingent cross remainders to each other; in the event that either of them should die without children. There is not in the whole will a single technical word that I can discover; of course, the construction is to be made according to the common understanding of the words he has used. The word "children" is therefore to be construed in its natural sense, and not strained to mean *heirs*, as the counsel for the appellants would have it; which would go to defeat the obvious intention of the testator, by giving an estate in fee simple to each of his children, instead of an estate *for life*, according to the express words of his will eight times repeated. The amphibious word *issue* indeed occurs once in the codicil; but, in such a manner as to show that the testator did not mean to use it as a word of limitation, and is well explained by the context to mean *children living at the death of the testator's* children respectively. "Should all my dear children die without *issue* "of their bodies, my dear wife living, one half of the life "estate to go to my dear wife during *her life*, the other "half to *Thomas Chapman*, &c." The contingency thus intended to be provided against, is clearly described, and must happen, if at all, within a few years after the testator's death, and during the life of his widow; leaving no doubt of the sense in which the word is used.

I shall now cite a few cases which appear to me to support the opinion I have given.

In *Wild's* case (6 Co. 17.) there was a devise to "*Rowland Wild* and his wife; and, after their decease, to their children." They then having children, it was adjudged they took an estate for life only; and, though it was admitted, if *A.* devises his lands to *B.* and *his children*, or *issue*, and he hath *not any* at the time of the devise; that the same is an *estate tail;* (for that the intent of the devisor is manifest and certain that his children or issue should take; and as *immediate* devisees they cannot, because they are not in *rerum natura;* and, by way of remainder, they cannot, for that was not his *intent;*) yet it was resolved, that, if a man, as in the case at bar, devise land to husband and wife, *and, after their decease*, to their children, or the remainder to their children; in that case, although

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they have *no child* at the time, yet every child which they shall have after, may take by way of *remainder*, according to the rule of law; for the intent appears that the children should not take immediately, but after the decease of *Rowland* and his wife. The most sharpsighted legal casuist could not discover any other difference between the case thus put, and that upon which we are to decide, except that, in the former, the devise is supposed to be made to a husband and wife; in the other, to *William* alone; unless that, in the case before us, the testator has superadded the words *during his natural life*, which, without altering the sense, serve to show the intention of the testator in a stronger light than in the case supposed.—But, as it was said in *Peacock v. Spooner*, (2 Vern. 196.) that *Wild's* case was not allowed to be law, it may not be amiss to observe that the question in that case arose upon the words "*heirs of the body*," and not upon the word "*children*." And that the resolution in that case was afterwards overruled in *Webb v. Webb* in the House of Lords. (2 Vern. 668.) In the case of *Warman v. Seaman* and *Pratt*, (*Finch's Rep.* 282.) Judge *Rainsford*, arguing upon the distinction between issue and children, said, "The word "issue" *ex vi termini* is *nomen collectivum*; and takes in all issues to the utmost extent of the family; as far as the words *heirs of the body would do:* and observed, that it was resolved in *Wild's* case, that a devise being to father and mother, and after their deaths to the children, the word children shall be a name of purchase and not of limitation, and they shall have but an estate for life: but had it been to their *issues* (as in the case before him) that the word issues should have been construed a word of limitation, and not of purchase; and so it was lately resolved in the Exchequer Chamber; and a judgment, given in the King's Bench to the *contrary*, was *reversed* upon the *authority of Wild's* case. This passage is cited and approved by *Grose*, *Justice* (4 *T. R.* 88, 89): and in the same case of *Warman v. Seaman*, the Lord Chancellor declared that he had considered the opinion of Judge *Rainsford*, and the reasons thereof, and was satisfied with it: for the resolution in *Wild's* case, on which he grounded his former opinion, would not hold, if, instead of "*children*," the word "*issue*" had been in that case, and that, when the Judges of the King's Bench had *lately held otherwise*, and fallen into the like errour, their judgment was for that very cause reversed in the Exchequer Chamber. (*Finch's* Rep. 283.) This book has indeed been denounced as one

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of no authority; (3 *Atk.* 334.) whether for want of the *imprimatur* of the Lord Chancellor and Judges, formerly prefixed to books of reports, I cannot tell. But the name of *Sir Heneage Finch*, the authour, who is mentioned by Judge *Blackstone* (3 Com. 55.) as a person of the *greatest abilities*, and most uncorrupted integrity, endued with a pervading genius which enabled him to discover and pursue the true spirit of justice, may weigh against the opinion even of Lord *Hardwicke;* especially where this book is cited and relied on by other Judges. Be this as it may, Lord *Hardwicke* himself decided the case of *Ives v. Legge* precisely upon the same principles. There the devise was to *Marthana Legge*, to hold to her own use during her natural life; and, after her decease, to the *children* of her body begotten, and their heirs; and, in default thereof, to *Wm. Legge*. Lord *Hardwicke* decided that here was a vested remainder in *W. L.*, and that *Marthana* took only an estate for life. (cited 3 *T. R.* 488, note.) And we have a similar decision by the same Judge in *Godwin v. Godwin*, (1 *Ves.* 226,) where the devise was to *Joan* the wife of *Sir Peter Seaman*, for and during her life; and afterwards to her children, to be equally divided between them, share and share alike: and, for want of such children, to the testator's right heirs. Lady *Seaman* had two children *then* born; and one born *after;* and the question was, what estate the after-born daughter had under that devise? And *Lord Hardwicke* said, wherever there is a remainder to children by settlement or will, it is not material whether they are alive or not; for it will vest in different parts and proportions, as they come *in esse:* and he held that they took as tenants in common for life only; and cited *Wild's* case as being to the same effect. In the case of *Doe v. Perryn*, (3 *T. R.* 484.) the devise was to *Dorothy Comberback* for life; remainder to trustees to preserve contingent remainders; remainder to all and every the *children* of *D. C.* begotten by her husband, and their heirs forever, equally to be divided between them; remainder over: and it was held that *D. C.* took an estate for *life only*, with remainder to her *children* in fee simple. And *Ashurst Justice* said, that the limitation to *Dorothy's* children was contingent until they were born; but it became vested on the birth of the first child, subject to be diminished in quantity as other children of *Dorothy* should be born: and, on the birth of *Dorothy's* first child, the subsequent limitations were defeated.

In the case of *Carter v. Tyler*, (1 *Call*, 185.) it was strongly contended, notwithstanding the clause in our Act

of Assembly respecting estates tail, that estates might yet be limited to provide for contingencies in families; and Judge *Pendleton* in delivering the opinion of the Court, said, "of this there is no doubt; a parent may guard "against an improvident child's wasting his provision; "by limiting his interest, or power over it. He may give "an estate for life, and limit remainders over upon it." This is precisely what the testator evidently intended in the present case, and what I conceive he has done. As to the negroes, I see no reason to distinguish the operation of the will, as to them, from its operation on the real estate. The case of *Higginbotham v. Rucker*, which arose upon a verbal *gift* of a slave to the daughter and the heirs of her body, and, in case she died without *issue*, (that is *children* of her body, as explained by the jury in their special verdict) to return to the donor, is certainly a stronger case than the present. And the *trust estate* being directed to go "*as the other estate devised*," I can make no distinction as to *that;* and am therefore of opinion that the decree of the Chancellor ought to be affirmed.

Judge Roane. I will consider this case in two points of view.

1st, Independently of the Act of 1776 docking entails, and the Act of 1785 dispensing with the necessity of words of inheritance to pass a fee: and 2dly, as affected by those Acts.

As to the first point of view; it will be found that *Shelley's* case is the substratum of the whole edifice. In that case, it was ruled that wherever the ancestor takes an estate for life, and, after, in the same conveyance, a remainder is limited, mediately or immediately, to his right heirs, or to the heirs male or heirs female of his body, that, in such case, his right heirs, or heirs male or female shall not be considered as purchasers, but shall take by descent. The reason given for this is, that as the heirs, or heirs male, &c. could not take as *purchasers*, not being *in esse*, and could only take through the ancestor, the estate for life was enlarged for their benefit. Another reason is given, from the parity and conformity that this limitation bears to a limitation to *A.* and his heirs, or to *A.* and his heirs male or female of his body: for as this gives an estate for life *by implication*, and more, so the other gives him the same in express words, and more; *et expressio eorum quæ tacite insunt nihil operatur.* (5 Bac.

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Abr. Gwil. edit. 732. Title "Remainder" by the Lord Chief Baron Gilbert.)

As it is generally said that estates tail are implied for the benefit of the issue in tail, so, under the first reason just stated, a fee simple is also raised in favour of the heirs on the same principle: but it is evident that the rule in *Shelley's* case does not apply to any case, where the persons in remainder can take, and were intended to take as *purchasers*.

The rule in *Shelley's* case being thus established, other expressions deemed equal in effect with the words *heirs of the body*, such as *issue of the body*, and *men children of the body*, were also construed to enlarge the estate for life into an estate tail. It is justly said however in *King v. Melling* (1 Ventr. 214.) *Ginger*, on the demise of *White v. White*, (Willes 348.) &c. that these words are stronger than the term *children;* that they indicate that the testator had an eye to an estate tail; and that the word *issue* takes in the whole generation; is used synonymously with heirs in the statute *de donis;* and is more properly a word of limitation than of purchase. The expressions just stated, therefore are much stronger to denote an estate tail, than the word "children" used in the case at bar, or in *Wild's* case, to be presently more particularly noticed. It is readily admitted that the word *issue* in a will, is either a word of purchase or limitation as will best effectuate the intention of the testator, *Roe* on demise of *Dodson v. Grew* (2 Wils. 322.) In *Roy v. Garnett*, (2 *Wash.* 9.) it is said by the court (pa. 32) "that "the surviving sons not only *might*, but must take as pur- "chasers; being to take, not in succession, but as tenants "in common." This position applies to the case before us, as the children of *Wm. Carr* are to take as tenants in common by the very provisions of the will. In this same case of *Roy v. Garnett* it is said by the president that "it has "been thought a circumstance of considerable weight, "that *issue*" (not *children*) "must be taken as a word of "limitation, where no words of inheritance are superad- "ded in the devise, because in such case, if the issue take "by purchase, they would only take an estate for life; and "that hence a distinction has arisen, that where words of "inheritance have been superadded, in the devise to the "*issue*, the issue has been adjudged to take by *purchase* "so as not to enlarge the estate of the ancestor; and this "was *Archer's* case, 1 Co. 66."

In the case at bar the term is not only *children*, (certainly much less a term of limitation than *issue*,) but words of

inheritance are, *in effect* superadded in the will, by the operation of the Act of 1785, which gives a fee, wherever a less estate is not limited by express words, or does not appear to have been granted, conveyed, or devised, by construction or operation of law.

In the same case of *Ginger v. White*, it is said that it is a mistake, that the terms *issue* or *children* in a will, where there are none *in esse* at the time, do as necessarily create an estate tail as the words "*heirs of the body*" do in a deed; and that they shall only be so construed, where that appears to be the intention of the testator. How the intention was in the case at bar, will presently more particularly appear.

In the case before us, the devise was to *Wm. Carr during his natural life*, and, *after his decease to his child or children;* if none, to *John C. and Betsey Tebbs* for life; and, then, to be equally divided between their children.

This devise *for life* to *Wm. Carr*, and which is said by the Chancellor, in his decree, to be no less than eight times repeated in the will, as relative to the several devisees, is certainly as strong as the devise to *James* for life in the case of *Roy v. Garnett;* and which, as is said by the President, denoted the intention of the testator in that case to be "to devise an estate *for life*, as manifestly as if "confirmed by one from the dead." (pa. 31.)

The devise for life in our case is perhaps, taking the whole will into consideration, not less strong than the vaunted devise "for life and *no longer*" in the case of *Robinson v. Robinson;* (1 Burr. 41) which last words "no longer" it was argued by the counsel, in that case, and I think with some force, were certainly tautologous, and had really no force in them at all, beyond the former words limiting the estate for life.

Thus stands the strength of the devise in our case, as relative to the devisee *Wm. Carr:* let us now see how it stands in relation to the ulteriour limitation—

As upon the will, (exclusively of the codicil,) the limitation is, *after the decease* of *Wm. Carr*, to his *child* or *children*. In *Wild's* case (6 Rep. 16. 3rd resol.) a devise of land to husband and wife; and, *after their decease*, to their *children;* or the remainder to their *children;* although they have not any child at the time, yet every child, which they shall have after, may take by way of remainder; for his intent appears that the children should not take immediately, but after the decease of husband and wife. This case emphatically applies to the one at bar; for it was

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there *so* held notwithstanding the children would only take an estate for life in remainder; whereas the children in question, in this case, will take a fee, by virtue of the forementioned Act of 1785.

The case of *Ginger v. White* not only *recognizes* the above case of *Wild*, but as perhaps still stronger, and is very similar to the case at bar: it would bear out the opinion I now entertain upon the case before us, even if the term children used in the will were, by virtue of the provision in the codicil, enlarged to mean *issue*, and so as to comprehend children *ad infinitum;* which however I shall presently attempt to show is not the case. In the case of *Ginger v. White*, a devise to *John* for life; and, *from and after his decease*, to his male children *successively*, *one after another*, *and to their heirs*, and in default of such to the female, &c. and in case *John shall die without issue* (that term not restricted, as in the codicil in the case before us) was held to pass only an estate for life to *John*. These two cases strongly apply to case at bar. *Wild's* case is expressly in point; admitting the case at bar to stand singly upon the word *children* mentioned in the will. The other case extends to our case as standing upon the will and codicil, and even admitting the term *children*, in the will, to be extended, by the codicil, to be commensurate with issue of the body collectively taken. But this is not the case.—The provision of the codicil is "should all "my dear *children* die without issue of their bodies, *my* "*dear wife* LIVING, one half of the life estate to go to my "dear wife, *during her life*, and the other half to go to "*Thomas Chapman*, &c." (persons *in esse*) "*during their lives*, &c." This limitation over, in favour of persons then living clearly shows, that the testator used the term *issue* in this case, as synonymous with *children*, and not as importing descendants *ad infinitum*. Nothing is more clear than that the word "*issue*" may be used in the one sense or the other, so as best to answer the intention of the testator. As, in this country, the term "children" now carries a fee, there is less reason to strain it into a word of limitation, than in England; as every purpose is already answered.

Notwithstanding what is now said, some strong cases have been cited to show that an express estate for life may be enlarged into an estate tail *to effectuate the manifest intention of the testator*. It was to effectuate such intention that the devise in the case of *Robinson v. Robinson*, was decided to enlarge the life interest into an estate tail:

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but there are some strong features in that case which do not exist in the present. In that case *L. H.* and his son, were to take the name of *Robinson;* and it was deemed improbable that the testator would impose, and perpetuate the name upon him, and yet, that the estate, in consideration of which it was to be assumed, was to endure only for life. In that case, also, the "perpetuity" of his presentations was given to *L. H.* (subject &c.) "in the "*same manner* and to the *same uses* as he had given his "estate;" thereby explaining the former devise by the latter.

The case of *Roe* on demise of *Dodson v. Grew*, (3 *Wils.* 322.) proves nothing as to the case before us; the limitation over being, after the decease of *G. G.* to the use of the *issue male of his body lawfully to be begotten;* words peculiarly importing an estate tail. Nor does the case of *Roy v. Garnett*, depending on a will made long before the revolution, (on whatever grounds decided by the Court;) prove any thing; the words in the limitation over being "if my son *James* die without *issue male*, &c.;" not "without *children.*"

In all those cases therefore there was a *general* intention *strongly appearing* in the will; (which does not exist in the case before us,) overruling the particular intention, and enlarging the life estate into an estate tail. This however can only be done, (where the life estate is *express,*) to effectuate the manifest intention of the testator.

In the case at bar nothing is gained in favour of intention, (and therefore no such intention shall be admitted to have existed,) by construing the limitation to be an estate tail, for it is *eo instanti* converted into a fee simple, by virtue of a general law, of which the testator could not have been ignorant. It is more agreeable to his intention that his *grandchildren*, (the children of *Wm. Carr*) for whose interest he seems anxiously to have intended to provide, should succeed in *remainder*, and their posterity under them forever, by virtue of the Act of 1785, (although *possibly some of the* GRANDCHILDREN *of William Carr the son and devisee* might not, in consequence of their father's dying in their lifetime, come within the *descriptio personæ* stated in the will, and therefore might be excluded,) than that the fee simple interest should at once vest in the first devisee, and he be thus enabled to disinherit all the testator's progeny descending through him: and the Chancellor is certainly very correct in saying, that the intention of

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the testator, to provide for his grandchildren, is the sole argument used on the part of the appellant's counsel to authorise and produce a destruction of their interests!

Such are my impressions upon the first point above stated: and, if upon the mere doctrines of English law upon this subject, an estate for life only would accrue to the devisee of *William Carr*, this is much more the case, when we take into our consideration the two Acts of 1776, and 1785.

The first cuts up by the roots the pretence of implying an estate tail for the *benefit* of the issue, and the second guaranties to a *son* or *child* claiming in remainder as a *purchaser* the absolute fee simple property in the land. This last consideration has before been stated as one which lessens the necessity for construing the term *issue* to be a word of limitation rather than of purchase. Nothing is more clear than that those Acts, if they are to be taken into consideration in the present case, would make the appellant's case much weaker than it is, in so far as we are inferring an intention on the part of the testator to provide for the issue of the devisee.

But in the case of *Tate v. Talky* this Court concurred in opinion with the legislature, that, in construing what was or was not an estate tail, we should have reference to the *former* laws, and that, as to the construction to be made in relation to that point, we should inquire what the "law *aforetime* (i. e. before 1776) was;" and one of the Judges in that case said, with great propriety, "that the intention "of the Act of 1776 was not to *alter* the established rules "of construction." In a case, however, where the intention of the testator is alleged under pretext of providing for his issue, but in reality to *infer* an estate which will defeat them, it would seem proper to *rebut* that allegation by resorting to a posterior *general* law, without an ignorance of which it is impossible that any such *intention* could have existed on the part of the testator.

In the case of *Tate v. Talky* it was argued by one of the counsel (who differed widely in opinion from the appellant's counsel in this case) that as estates tail were implied for the *benefit* of the issue, and as, since 1776, entails are destroyed, and the benefit to the issue no longer exists, the reason of the rule ceasing, the rule ought also to cease.

The counsel alluded to in that case appears for a moment, to have forgotten that the reasons, (or some of them,) in *Shelley's* case have also ceased, and yet that the rule continues; that although the feudal reason of requiring

words of inheritance to carry a fee has also perhaps ceased, it was not for this Court, but for the Legislature, by the Act of 1785, to alter the rule itself; that it is better perhaps to have some *established rules* of property, after the different reasons thereof have passed away, than to be in a perpetual state of uncertainty whether the reason of the rule exists or not; and that, so far from the Courts having power to abolish the rule in question *on this ground*, the Legislature have positively set up, *e contra*, the whole system of rules in relation to estates tail: although *eodem statu* it destroyed (as to many cases,) the reason of the rule; and a similar power belonged to, and has since been exercised by, succeeding Legislatures.

On these grounds then, that, neither before nor since the Act of 1776, a greater estate than one for life can be construed to have passed to *William Carr* by the will of his father, I am of opinion that the decree of the Chancellor is correct, and ought to be affirmed.

JUDGE FLEMING. This case has been so fully, and so ably investigated, and elucidated by the Judges who have preceded me, that little remains for me to say; as it would be a waste of time again to travel over the same ground; and I shall only observe that it is a rule too well settled to need repeating here, that in the construction of a will, the intention of the testator is to govern in every case, where it does not contravene a well established rule of law: and it was well observed by the late venerable and enlightened President of this Court, "that adjudged cases have more "frequently been produced to disappoint, than to illus-"trate the intention; and that where such intention is "apparent, cases must be strong, uniform, and apply "pointedly, before they will prevail to frustrate that in-"tention." And it appears strange to me that so much pains have been taken, and labour spent in the case now before us, in attempts to prove that the words used in the devise to *Wm. Carr*, gave him, by implication, an estate which is now (and at the time of making the will had long been) unknown to our laws; that it might be magically transmitted into an estate in fee; in order to frustrate and defeat the plain, manifest will and intention of the testator. The case appears to me so clear, that I shall only add my hearty concurrence in the opinion that the decree ought to be affirmed.

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JUDGE LYONS. I shall make short work of all questions arising on the construction of wills made since the Act of 1776: so far at least as it may be necessary to decide whether the testator meant to pass a fee tail or not. I will not *suppose*, after that Act, that a man intended to convey an estate tail, (which the law has expressly abolished,) unless plain and unequivocal words are used, such as would of themselves create a fee tail, without resorting to implication; as a devise "to *A.* and the heirs of his body," or "to *A.*, and if he die without issue, &c." To fulfil the plain and manifest intention of the donor, the limitation must be equally plain and express; but not an implied limitation by mere construction to enlarge an express estate for life to an estate in fee or fee tail. For, if the donor did not mean an estate tail, but only used words which, by construction, might be so implied, in order to fulfil his intention; are they now, without necessity, and by implication only, to be construed into a fee tail to defeat that intention? The construction ought to be as near the apparent intention of the parties as possible, and as the law will permit. Where words are doubtful we should inquire into the *intention;* and, if that be clear, we should put such a construction on the words as will best carry the intention into effect, and reject that construction which manifestly tends to overthrow and destroy it, if such intention be not contrary to express rules of law. We are not to put words in a deed, or will, which are not there, nor construe them in direct opposition to the plain sense. But when the intention is plain and manifest, and the words doubtful and obscure, it is the duty of the Judge to be *astute* in endeavouring to find out such meaning in the words as will best answer the intention of the parties. See *Willes's Rep.* 327, *Parkhurst* v. *Smith.* The construction contended for in this case by the appellant's counsel, shows what the wit of man can do, when it is employed in making objections.

An estate tail in the case of land, has been raised by implication to enlarge even an express estate for life and give an estate tail to favour the testator's intention: but ought not now to be made, by implication, to destroy that intention, when he meant only to give an estate for life: for the testator's intention shall make words either an estate for life or an estate of inheritance, as shall best promote that intention. See 1 *P. Wms.* 431, *Target* v. *Gaunt.*

Apply the above rules of construction to the case before us; and the question is at once decided. The inten-

tion of the testator to give an estate *for life only* to his son *William* is manifest from the whole context of his will. The widow of *William* is consequently not entitled to dower; and I concur in the opinion delivered by the other Judges, that the decree of the Chancellor be affirmed.

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WOODFORD'S heir *against* PENDLETON.

Monday, 8th, *June*.

This was an appeal from a judgment of the District Court of *Fredericksburg*.

The appellee being the heiress of one *Catlett* brought an action of covenant against the appellant as heir at law of *W. Woodford*, upon certain indentures of lease and release. The declaration in the usual form, sets out the indentures, from *Woodford* to *Catlett;* (whereby the former conveyed to the latter, 300 acres of land, *fully to include that quantity*, with general warranty, covenants for peaceable entry, quiet enjoyment, and general indemnification against claims and suits;) also *Catlett's* entry, seisen and death; and that *W. Woodford* bound himself and his heirs to *Catlett*, his heirs and assigns, for the performance of the several covenants contained in the indentures: after which, the declaration states, that "the lands, covenants and wri- "tings aforesaid, with all their rights, members and ap- "purtenances, have *descended* on the said plaintiff." It is then averred, that the defendant is the heir of *W. Woodford*, and that assets to more than the value of £100 have descended on him from the said *W. Woodford*. The breach assigned is, that the said *W. Woodford*, and the said defendant did not keep their covenants, but broke them, in this, that the said tract of land did not include 300 acres, but only 280 acres; and also in this, that they have not warranted and defended the plaintiff, and those under whom she claims, and their assigns, from all claims; nor kept them harmless and in quiet enjoyment; but, for want of title, they were prevented from taking possession, and had been evicted.

In an action *by the heir* for breach of covenants contained in a conveyance of lands to the ancestor, if the declaration avers the entry, seisen, and death of the ancestor, "and that "the lands, "covenants, "and wri- "tings afore- "said have "descended "on the "plaintiff," without setting forth the manner in which he derived his title, it is good after a verdict.

In an action *against the heir* on a covenant entered into by the ancestor, if a breach is assigned to

have been committed both by the ancestor and the defendant; the defendant pleads that "*he has not broken* the covenant;" without saying any thing as to the breach by the ancestor; and the jury finds for the plaintiff that "*the defendant has broken the covenant;*" judgment ought not to be arrested; the defect being cured by the Act of Jeofails.

Where the declaration alleges that the heir has assets by descent; if he fails to plead that he has no assets, or does not set forth the assets in particular, it is not necessary for the Jury to find assets.

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The defendant, after taking oyer of the indentures, pleaded that he had not broken the indentures; and put himself upon the country; and the plaintiff likewise.

The jury, in their verdict, found that the defendant had not performed, but had broken the covenants as the plaintiff had alleged; and assessed her damages at *seventy* pounds.

The defendant filed errours in arrest of judgment, assigning that the plaintiff had not shown that she was heiress at law to *Catlett*, or that she was entitled to this action under him.

The court overruled the errours, and gave judgment for the plaintiff on the verdict; from which an appeal was taken to this court.

Randolph, for the appellant, contended that the want of an averment in the declaration that the plaintiff was the heiress at law of *Catlett*, was a radical defect, which was not cured by the verdict. It is not sufficient to say that the "lands, covenants, &c." *descended* on the plaintiff. Her title should have been expressly deduced, from the ancestor, and the *manner* of the descent stated. But she does not describe what kind of heiress she is; nor does she even say that the ancestor died intestate.

But the point on which he principally relied was, that there was no failure of title specified. The breach was assigned merely in the general language of the covenant. The rule in declarations of this kind, where damages, are claimed for a breach, is, to state the *manner* in which the breach happened. There are two modes by which it may be done; either by charging an actual *eviction*, or a *subsisting* title in another. If either had been stated, reference might have been had to facts and documents to ascertain the truth of the charge.

If the issue had been properly joined in this case, still the verdict is incorrect. The covenant binds the man and his heirs; the declaration charges a breach in both the ancestor and heir: the issue is to the defendant himself; this is an issue only as to part. It is true, that judgment might have been given, as to the other part, for failing to plead, though it does not appear upon the record. But ought not the verdict to have found assets? It may indeed be stated in the declaration that they descended: but *assets which come to the hands of the heir* being the *gist* of the action, they ought to have been specially found. An heir, in many cases, may admit assets by his pleading.

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But, where *proof* of assets is necessary, nothing will supply the want of it. A title defectively set forth may be cured by a verdict, but where the *gist* of the action is not stated, it is never cured. In this case the descending of assets to the heir constituted the very *gist* of the action.

Botts, for the appellee. With respect to the objection that the plaintiff did not deduce her title from the ancestor under whom she claimed, the act of jeofails is decisive on the point; and some hundreds of cases might be cited to prove its application. If the "lands, &c. descended," how could they come to her, unless she was in a situation to take by descent?

But, it is said, that the *manner* in which the title was lost ought to have been specified. This has been sufficiently done, by stating that the defendant had *no title*, as to the land for which damages were claimed. It is admitted that the declaration is imperfect; but it makes out a case in which there were covenants by the ancestor which devolved upon the heir. He is expressly bound; and might have committed a breach as to some of the covenants. He pleads that there was no breach by himself; the verdict of the jury has falsified his plea; and the court will intend that damages were given for a breach actually committed by him. The most that can be said is, that the title is defectively set forth.

The defendant had no right to complain that the whole breaches were not put in issue. The parties may waive part of the issue, if they think proper.

But it is objected, that the jury have not found assets. If they had done so, they would have gone out of the issue: for they were only charged as to the breach of the covenants. Like the case of an executor; if he plead *fully administered*, assets must be found; otherwise not. Why should a difference be made in the case of heirs?

He cited the case of *Cohoons* v. *Purdie*, (*a*) as decisive of the last point.

(*a*) 3 *Call*, 431.

Randolph, in reply, insisted that the defects in the declaration and pleadings, were too much a matter of substance to be aided even by the omnipotence of the statute of jeofails. In suits and bonds with collateral conditions, it has always been held necessary to assign specially the breaches of which you complained, in order that the defendant might be prepared to answer. So, in a case like

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the present, where the plaintiff charges an eviction, it is equally necessary that he should state by whom; that the defendant may be enabled to meet the allegation.

As to the necessity of finding assets;—there is an essential difference between an heir and an executor. An heir is not answerable unless he have assets by descent; but an executor, representing the person of the testator, and being possessed of all his goods, immediately on his death, has nothing to do, when a debt is presented, but to inquire into its justice, and ascertain whether the assets of his testator will enable him to pay it.

The case in 3 *Call* is not like the present. There, the heir had pleaded a false plea relative to the assets.

Tuesday June 9th.—By the whole Court, judgment affirmed.

Wednesday 10th June.

WITHERINTON *against* M'DONALD.

In an action of ejectment, evidence cannot be introduced to prove that a patent was *irregularly* obtained.

Quere, whether, in such case, evidence is admissible that a patent was obtained *by fraud*.

This was an appeal from a judgment of the District Court of *Hardy*, rendered in an action of ejectment. The plaintiff (the now appellee,) claimed under a patent dated *May* 26, 1791; the defendant (the present appellant,) under one dated *June* 28, 1792.

On the trial, before the Jury, the defendant offered evidence to show that the *survey* upon which the plaintiff's patent was founded was illegal; and also offered to prove that the said patent was obtained upon a certificate signed by *Charles Lewis* as *Clerk* of the Land Office, (instead of being signed by his *Register* or his *Deputy;*) which evidence the Court would not permit to go to the jury: to this opinion the defendant objected, and tendered a bill of exceptions, which was signed and sealed by the Court. There was a verdict and judgment for the plaintiff; from which the defendant took an appeal to this Court.

Page, for the appellant. The question to be submitted to the consideration of the Court is, whether it be competent to a party, on the trial of an ejectment, to impeach the validity of a patent. It is understood to have been decided in this Court, in the case of *Hambleton v. Wells*, that, where the defendant wished to prove that the patent un-

der which the plaintiff claimed had been fraudulently obtained, he ought to have been permitted to introduce evidence for that purpose. The District Court refused to permit such evidence to go to the jury; and this Court reversed that judgment.

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Judge ROANE, inquired whether the case of *Hambleton v. Wells* had ever been reported. On being answered in the negative; he observed that he had a MS. note of it, copied from one in the hand writing of *Judge Pendleton;* and, if no better report could be had, he would submit that to the inspection of the Court;* of its accuracy he had no doubt, though it was but a brief note.

Judge LYONS. That case was determined on a division of the Court, of three Judges to two. Three were of opinion that the fraud might be inquired into at law, and two that it could only be relieved against in equity. But the law has never been deemed to be settled on one decision, where there has been nearly an equal division of the Court.

Stuart, for the appellee. If the court is satisfied that this case does not come within the reason of the case of *Hambleton v. Wells*, so far as that was decided on the

* *Hambleton et al. v. Wells.* Appeal from *Monongalia* District Court.

Wells, plaintiff v. *Hambleton et als.* defendants in ejectment. Defendants offered in evidence 1st, a copy of a Proclamation of *Geo.* 3, to grant lands to certain officers and soldiers; 2ndly, as also the testimony of witnesses to show, that the deed of the lessor was granted to *Sarah Gibbs*, representative of *J. M'Nalby*, and not to the soldier himself, as is necessary by the proclamation; 3rdly, and further, to prove by said witnesses that there never was a survey made by any county surveyor properly commissioned, and that the lessor of the plaintiff (the patentee,) was actually privy thereto, and procured a plat to be returned without a survey actually made: and, 4thly, two witnesses to prove an actual settlement by *J. Cox*, before the warrant to *Gibbs;* which settlement was recognized by commissioners, and by assignment by *Cox* to *Decker:* and 5thly, a deed in favour of *Decker*, (in consequence of said certificate and assignment,) by the Governour of Virginia.

In *September*, 1790, the District Court overruled all the testimony, except as to the deed last recited, which alone they declared admissible testimony for the Jury. The defendants appealed.

The Court of Appeals, *June* 1791, decided "That the District Court "erred in not permitting the appellants to give evidence, that the appellee procured the plat, on which the patent was obtained, to be returned "to the office, knowing that an actual survey had not been made, and "which, if proved, would make the grant void at law. Judgment reversed, and cause remitted, with directions to admit that evidence to be "entered into, but none of the other matters offered by the defendants "and rejected by the Court."

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question of fraud; and that the other points in it, which are applicable to the case now to be decided, have already been settled, it will be unnecessary to trouble the Court with an argument. But, if the Court should entertain any doubt on the subject, he would wish to be indulged with a few remarks.

Judge TUCKER mentioned his having signed a bill of exceptions while on the Circuit, (in the case of *Laird* v. *Donnahue*, which had since gone off for want of prosecution,) in order to bring a case similar to that of *Hambleton* and others v. *Wells* again before the Court. He professed himself not satisfied with that decision. But his opinion might have been hastily made up; and, if he had taken an erroneous view of the subject, he wished to be convinced of his errour. He was therefore in favour of an argument.

Judge ROANE observed that, as the case now before the Court did not prevent a question of fraud, he could not think an argument necessary. The Court of Appeals, in the case of *Hambleton* and others v. *Wells* affirmed the judgment of the District Court as to all the points, except that which revolved the question of fraud. On that point the Judges divided; but he presumed they would have been unanimous, on all the other points.

Judge TUCKER then remarked, that, as no fraud was alleged in this case, he did not see the propriety or necessity of an argument.

The Judges severally delivered their opinions.

Judge TUCKER considered the evidence as properly rejected by the District Court, and was in favour of affirming the judgment. [See his opinion given more at large on the next day.]

Judge ROANE. Every point, which occurs in this case, has already been settled in the case of *Hambleton* and others v. *Wells*, and properly decided, I am therefore of opinion that the judgment ought to be affirmed.

Judge FLEMING was of the same opinion; he was satisfied that the point had already been settled.

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Judge LYONS. My own opinion, in the case of *Hambleton* and others *v. Wells*, was, and still is, that, *at law*, no evidence can be adduced to impeach a patent. I am for affirming the judgment.

Thursday, June 11. Judge TUCKER, (after stating the case) delivered the following opinion.

There being no suggestion of *fraud* on the part of the plaintiff in obtaining his patent, in this case we are relieved from the necessity of discussing the decision of this Court, in the case of *Hambleton, Bradford* and others *v. Wells*, June term 1791,* in which the defendant offered to prove the plaintiff to have been guilty of a fraud in obtaining his patent, by procuring a plat to be returned to the Register's office, knowing that an actual survey had not been made. By a note of that case yesterday read in Court by one of the Judges, who copied it from a note of the late President, *Mr. Pendleton*, it appears that other extraneous evidence was offered and rejected by the Court on the trial of that cause; such as a copy of the proclamation of Geo. 3, to grant lands to certain officers and soldiers; 2dly, testimony of witnesses to show that the deed (perhaps the patent) of the lessor of the plaintiff was granted to *Sarah Gibbs* the representative of *John M'Nalby*, and not to the soldier himself, *as was necessary by the proclamation;* 3dly, witnesses to prove an actual settlement by *James Cox* before the warrant to *Gibbs*, which settlement was recognized by the *commissioners;* and an assignment by *Cox* to *Decker*. All which testimony this Court appears to have considered as properly rejected. The evidence offered in the present case appears to me to stand upon the same footing. It might *perhaps* have availed upon a *caveat;* (a proceeding calculated to prevent the emanation of a patent;) where the party applying for it does not proceed in the manner which the law requires: but, a patent being the highest evidence of a complete *legal* title, and a matter of record; no evidence, not in itself sufficient to avoid it, ought to be admitted to go to a jury on the trial of an ejectment. I am therefore of opinion that the judgment be affirmed.

Judges ROANE, FLEMING, and LYONS expressing themselves satisfied with the opinions delivered yesterday, the judgment of the District Court was unanimously affirmed.

* See *Tucker's Black.* vol. 3, pa. 261, note 10.

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HOOK *against* ROSS.

Wednesday, 10th June.

On an appeal from a decree of the Superiour Court of Chancery for the Richmond District pronounced by the late Judge of that Court.

On a bill in equity for specifick performance of an agreement, the Court ought not, in lieu thereof, to decree a sum of money *absolutely*, but may *conditionally*; giving the defendant his election either to pay the money, or to perform the agreement specifically.

This was a cause of much expectation and of considerable importance as it respected the sum in controversy; but the points of law presented to the consideration of the Court were confined within very narrow limits indeed.

The principal point on which the case turned, and that on which the Court seems to have decided, was, whether such contumacy in the defendant as would authorize a court of equity to presume against him as a spoliator,* would also warrant a decree for a *sum of money* when the bill was brought for the *specifick execution* of an agreement. Another point was, whether an attachment, and, afterwards, a writ of sequestration were regularly awarded in this case.

In such case, if the defendant be guilty of contumacy, and the Court, from the want of evidence *which he is bound to disclose*, be not able to direct the specifick performance, a sum of money may, in like manner, be decreed for the purpose of compelling the production of such evidence.

The case was this: *Ross* filed a bill against *Hook* in the High Court of Chancery, about the year 1793, for the purpose of obtaining a settlement of the affairs of a mercantile connexion which they had formed in 1771; and obtained an order for an account. On the 30th of March, 1795, an agreement, sometimes called a compromise, was made between them; and on the succeeding day, *Ross*, in what is styled a missive, which was meditated in the compromise, proposed a change in the compromise itself; and *Hook* assented to the missive.

The terms of this compromise not having been executed by *Hook*, *Ross* in the year 1799, brought the present suit in the High Court of Chancery. The bill stated the partnership to have existed between them in the year 177–, in which *Ross* had an interest of *three fourths* and *Hook* of *one fourth;* and that the business was to be conducted by *Hook;* that *Ross* sued *Hook* for an account (referring to the suit first mentioned,) and, an order having been made to that effect, an agreement was entered into, constituting all *Hook's* property partnership stock, and giving to *Ross* two thirds and to *Hook* one third; that *Hook* would not render the account, and in other respects "*specially perform his said agreement.*" The proceedings in the former suit and the agreement were said to be an-

A writ of sequestration

* *In odium spoliatoris omnia præsumuntur.*

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nexed; and the prayer of the bill was, that *Hook* "*might* "*be compelled specially*" to perform the said agreement, to execute the necessary "conveyances, and to pay to "*Ross* what might be due to him, &c."

An attachment for not answering having been served upon *Hook*, in March 1800, the usual *general* order for taking the bill for confessed *nisi* was entered; a copy of which was delivered to *Hook* on the 6th of May following.

cannot regularly be issued on a sheriff's return of "*non est inventus*" upon an attachment for contempt.

In August 1800, *Hook* answered, and admitted that on the 30th of March 1795, he entered into the said agreement or compromise, which was intended absolutely to settle and put an end to the former suit, and include all their disputes; though it was a harsh compromise to him, and assented to while he was in difficulty; considering which, he, for some time, believed that *Ross* would not insist upon the execution of it to the extreme. After the compromise, he expected the suit had been dismissed.

Hook further answering, admitted that the copartnery began in 1771, but said it was to continue for seven years only; that, during that period, the trade was a losing one; goods being retailed on credit as low as 65 and 75 per cent. advance on sterling cost, and tobacco producing loss in its sales in 1771, 1772, and 1773; in 1774 the Revolution was commencing, and in 1775 imports and exports were stopped; and, before any considerable collections could be made, depreciation of paper money took place: that *Hook* put his all into *Ross's* hands at the commencement of the copartnery, being about £1300 sterling, and *Ross* received many of the debts, but *Hook*, until after 1775 and 1776, had but little of the partnership money; that the money realized by *Hook* was at a great loss; that *Hook's* present property had been acquired by his efforts since the partnership ceased; that the goods were imported through *Ross's* partners and correspondents, and perhaps at prices improperly advanced; and that *Hook* had made great payments to *Ross*.

On the 22d day of September, 1800, the accounts were referred to a commissioner; but on the 3rd of October, 1800, on *Ross's* motion, that order was set aside, and the commissioner was directed to state an account of payments since the 30th of March 1795: and of the lands, slaves, goods, and credits of *Hook* on that day:—To estimate the value of those lands, slaves, and goods, and to report the rents and profits.

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On the 10th of March 1801, the commissioner reported, and stated his appointments for a meeting as follows: 5th November, 1800;—*Ross* attended, not *Hook*.—22d December, *Ross* filed an account of payments by *Hook*.—*Hook* attended, and business was adjourned from day to day, that *Hook* might propose a compromise. *Hook* said, that he could not render the accounts required by the decree of October 3, 1800. The commissioner then prepared a statement, showing how *Hook* was to perform the decree, and appointed the 20th of February 1801, for a meeting.—*Ross* appeared with every paper: *Hook* did not.

On the 11th of March 1801, an *attachment* was awarded against *Hook* for refusing to attend the commissioner; upon which the return made by the *sheriff*, was "*not found within my bailiwick.*"

On the 26th of May 1801, a *sequestration* was awarded against *Hook* to enforce his attendance before the commissioner.

This severe process was executed in the most minute manner; an inventory was returned of *Hook's* estate, and he was deprived of the whole. The sequestrators, in their report, set forth the immense injury to which *Hook* was subjected by the operation of this process.

On the 7th of October 1801, the Court ordered the lands to be rented out, and the other estate to be *sold;* and allowed the sequestrators five dollars per day. A report of the sales made by them was returned to Court.

On the petition of *Hook* for a supersedeas to the sequestration, and offering other security, (which consisted of a deed of trust for the whole of his property) the supersedeas was awarded, and the sequestrators were to obtain three dollars per day for their trouble. The sales had commenced when the supersedeas reached a part of the sequestrators. The remaining property was relieved.

On the 20th of November 1801, the commissioner of the Court (*Mr. Wm. Hay*) reported, that in obedience to the order of the 3rd of October 1800, he, on the 23rd of October 1801, gave *Hook* notice to attend at his office on the said 20th of November 1801, with the books, &c. from 1771 to the 30th of March 1795; that the parties attended but *Hook* would not produce them; and the commissioner suggested that the order for referring the accounts made in the old suit should be resumed and acted upon:—he proceeded accordingly, and entered into a lengthy and able detail to justify his proceedings. He then took the

depositions of two witnesses to show the statement of accounts from the books of *Ross* and *Hook*:—he proceeded to report as to the compromise of the 30th of March 1795, and endeavoured to show, from the conduct of *Hook*, that it ought not to form the basis of the account: he then proposed a certain mode of adjustment to the parties; which was, that the sequestrated property should be included in a deed of trust to secure *Ross*, except some particulars which were noted; and *Hook* assented to it, unless disapproved by his counsel. The commissioner now professed to state the accounts as they stood before the compromise, to introduce the payments made by *Hook*, and the credits due to him under the memorandum referred to in the compromise. The grounds of this statement are the books and the testimony of witnesses; and the copartnery is extended, beyond the date of the compromise (the 30th of March 1795) to the 25th of December 1795.

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At the same term that this account was returned into Court, *Ross* pressed the consideration of it: *Hook's* counsel opposed it as being contrary to the practice of the Court, and because it was impossible for them, in the short period allowed, to possess themselves of the necessary information, to do justice to their client.

On the 2nd of March 1802, *Hook's* counsel filed exceptions to the report of the commissioner, to which *Ross* replied. Among the items excepted to was an allowance to *John F. Price*, the agent of *Ross*, in discovering to the sequestrators the property of *Hook*.

On the 24th of March 1802, the decree of the chancellor was rendered. It overruled the exceptions of *Hook's* counsel and decreed against him £16,347 4 7½ with interest on £12,229 12 2¾ from the first of January 1802; and allowed the sequestrators five dollars a day.

From this decree *Hook* took an appeal to the Supreme Court of Appeals.

Several papers which were before the Master Commissioner were deposited by him with the Clerk of the Superiour Court of Chancery after the decree was pronounced. These, on the motion of *Hook*, were certified to the Court of Appeals to avail only what that Court should suffer them to avail. Among these papers were many filed by *Ross;* but such, as were important to the cause, and desired by *Hook*, to be filed with the record, were specially noted. They are the following: 1. A letter from *Hook* to *Ross*, of September, 1795, complaining of the hardship of

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the compromise.—2. *Hook's* answer, filed in order to be relieved from the attachment.—3. An agreement, sometimes called a missive, between *Hook* and *Ross*, dated March 31, 1795, and the memorandum thereto annexed. 4. A deposition, and *Hook's* answer showing why the books could not be procured.—5. *Hook's* petition to the Chancellor requesting him to inspect the answer, which could not be filed under the then circumstances; *Ross's* reply; and *Hook's* reply to him.—6. The compromise, or compound, between *Ross* and *Hook*, of March 30, 1795.

This cause was very elaborately and very ably argued by the *Attorney General*, *Randolph* and *Wickham* for the appellant, and by *Warden* and *Call*, for the appellee. Most of the argument, however, having relation to the proceedings in the cause in the Superiour Court of Chancery, and the report of the Master Commissioner, which was no further sanctioned by the Court of Appeals than as the sum reported by him was to stand as a security for the appellant's compliance with the specifick agreement, of the 30th of March 1795, and with the modification of that agreement expressed in the missive of the next day, it will be unnecessary to notice many of the points made by counsel in the course of their argument.

On the part of the appellant it was contended that the compromise was the true basis of settlement; that the affairs of *Hook* and *Ross* being various and complicated, it was important to both to end the controversy, which might have grown out of the suit of 1793. This furnished a sufficient motive to *Ross*, to enter into the compromise of 1795, which being executed with all the solemnities of law, and founded on a valuable consideration, completely put an end to all preexisting controversies and essentially changed the relations of the parties. Yet the Commissioner had reported, and the Chancellor decreed, as if no compromise existed. That, on general principles, the decree could not be supported. The bill having been brought for a specifick performance, that alone ought to have been decreed. That, even if *Hook* were in contempt, still it would neither justify the proceedings against him, nor would it warrant the decree of the Court, for a *sum of money* grounded on a report which professed to open the old accounts, as if they had not been closed by the compromise. All that could have been done was to presume against him as to those subjects which were embraced by

that agreement, or to commit him to prison for the contempt. But it was denied that *Hook* was guilty of any contempt: for he only refused to produce books and papers which the Commissioner had no right to call for. It was said that an unusual degree of precipitancy had marked the progress of this cause in the Superiour Court of Chancery, which not only put it out of the power of *Hook* to obey the process of the Court, but deprived him of an opportunity of canvassing the report of the Commissioner, which was eminently erroneous, principally, because it proceeded on the basis of the old suit of 1793, although that suit ought to have been considered as at an end; it entered into inquiries foreign to the compromise; it continued the copartnery from March to December 1795, when, in truth, it was considered in the compromise and missive united as having terminated in March; it blended together the rights under the original copartnery, and those under the compromise, as if they had been the same; it abandoned the idea of a specifick execution *at one* moment, *at another* resumed it, and at length included the property of *Hook*, acquired independently of the copartnery, in the fate of the affairs of the copartnery; it violated the principles which have been established by this Court concerning paper money, debts, and credits; and its items were in very many instances plainly erroneous. For these reasons it was contended that the report ought to be remitted to the Chancery for reformation.

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With respect to the writ of sequestration, it was a process seldom resorted to in this country, and in the application of it we must be guided entirely by the practice of the Courts in England professing Chancery jurisdiction. There being no statutory provision on the subject in Virginia, and the consequences of the writ being more calamitous than any other known in the law, every precaution used in England to guard against the oppression of the subject ought to be strictly observed in this country to prevent the oppression of the citizen. By comparing the preliminary steps taken in this case with the practice in England it will be found that there has been a very essential departure from the process used in the Courts of that country previous to awarding the writ of sequestration. Not only has some of the intermediate process been entirely omitted, but the writ itself was grounded on the return of the *Sheriff* "not found," when it could alone have been authorized by the return of the *Sergeant at arms* of the Court of Chancery. The reason why the re-

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turn of the *Sergeant at arms* is necessary must be obvious. He is an officer of this Court recognized by law, (*a*) and may execute its process in any part of the Commonwealth; the *Sheriff* in this State, as in England, is confined in the execution of his process to the limits of his own county. It might often happen that a party would be absent from his county on indispensable business when a process was directed to the *Sheriff* of that county. If then the return of the *Sheriff* "not found," should be sufficient to ground this process, a man might be liable to all the consequences of a contempt, without even knowing that he had been called on to perform an order of the Court. But the *Sergeant at arms*, not being confined to any particular county in the State, may pursue those against whom he has process into any part of the Commonwealth, if they should not be found in their own proper county: and the Court will never proceed to a writ of sequestration till it is justified by a return of its *own officer*. Such being the caution observed in England in favour of the liberty of the subject; what good reason can be given, why we should dispense with it in this country, especially when there is no statute authorizing our Courts to narrow its limits? Even if *Hook* had been guilty of a contempt, still, after presenting his petition to the Chancellor, and obtaining a supersedeas to the writ of sequestration, it might have been supposed that his contempt was cleared, and that he stood before the Court as any other person. There existed then no right to go back to his former conduct: much less right was there to presume against him a *sum of money*, when all that could have been presumed was that he had lands, slaves, and personal estate. As to the claim for an extra allowance to *John F. Price*, the agent of *Ross* before the sequestrators, it was inadmissible, because the sequestration itself was irregularly issued.

(*a*) See Rev. Code, 1 Vol. p. 64, Ch. 64, Sect. 10.

It was also argued that the *attachment* issued irregularly in this case, because it was *absolute* in the first instance, and was moreover grounded merely on the report of the commissioner; whereas, to authorize an attachment, a rule *nisi* ought to have preceded it, and it must appear that some process or specifick order of the Court, which had been served upon the party, had been disobeyed. On this point and the doctrine of sequestrations, the counsel for the appellants cited, 1 *Harr. Ch. Prac.* 242, 245, 250, 246, 254, 256, 257, 259, 322, 323. 2 *Comyn's Dig.* 36. 6 *Bac. Abr. Gwil. edit.* 136. *Gilb. Ch.* 17. 2 *Solicit. Guide*, 519.

On the part of the appellee it was insisted, that the conduct of *Hook*, in contemning the process of the Court and defying its justice, imposed on the Judge and the Commissioner, the necessity of resorting to the measures which had been pursued; that it was impossible for *Ross* to ascertain the situation of the property embraced by the compromise, or the mutations which it had undergone since the date of that instrument, unless a discovery could be had from *Hook;* that *Hook* having refused to make any disclosure, or to furnish the necessary books and papers, the Chancellor was warranted in directing the Commissioner to presume against him as a spoliator, and to make the best report he could from the documents which could be procured; that the Commissioner was justified in calling for the books of *Hook* and *Ross*, because all the property was constituted partnership effects, by the compromise, and without an examination of the books it was impossible to tell what debts were due to the firm; consequently the account could not be taken without them, under the circumstances of this case the Commissioner was compelled to resort to that evidence which was in his power. *Ross* had it in his power to prove the original partnership and stock in trade; and a report was made up, (grounded on those data,) allowing a very moderate profit upon the capital employed, which produced a larger sum than that decreed by the Chancellor.

Although a Court of Chancery may commit to prison for a contempt, in suppressing documents, yet there is no necessity for doing so. A shorter course may be pursued. The Court may presume against the party immediately, and he may avoid the presumption by complying with the mandates of the Court. Every thing may be presumed *in odium spoliatoris:* (*b*) and, where the party is in possession of documents, and suppress them, the Court may presume at once. (*c*)

(*b*) 1 *P.Wms.* 732.

(*c*) 2 *P.Wms.* 748.

The decree of the Chancellor was right in directing a sum of money to be paid instead of a specifick execution of the compromise. That *Hook* was originally indebted to *Ross*, was clearly proved; and it was only necessary to allow the latter a reasonable profit on his stock, and compensation for his trouble, to ascertain the amount of that debt. Though the compromise would have been advantageous to *Ross*, yet, as *Hook* refused to give any information concerning the property, it was impossible to take any account of it; and it is now too late for him to avail himself of his own act or to claim the benefit of the compro-

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mise. If the cause were sent back, there would be no chance for justice; because the whole process of the Court had before been tried without effect. But, if the Court should not be inclined to adopt the report of the Commissioner, founded on the data already mentioned, it would be proper to adopt the second report, grounded on the report of the sequestrators and such other evidence as could be collected, with respect to the value of the property included in the deed of compromise, and to decree the payment of money. The property having been restored to *Hook* after the discharge of the sequestration, the presumption is, that part of it has either been consumed or sold by him. If the decree should be for a specifick performance, it would produce endless litigation: for, *Hook* having conveyed away the property, the purchasers might contend that it was not liable in their hands, in consequence of the want of either actual or implied notice.

With respect to the process, it was argued that the attachment issued regularly, and was a proper foundation for a writ of sequestration. There is a known difference between process of contempt issuing *after* and *before* appearance. If the party have not appeared, he is considered not *rectius in curia;* but, after appearance, he is supposed to be conusant of all the proceedings in the cause. A rule will be granted *to show cause* in the one case, and not in the other. The rules of proceeding in a Court of Chancery were adopted from the cannon and civil law, with a mere variation in the names of the process. If the party once appear, none of the previous process is necessary. All that is required is, that the party shall have notice of the order. (*d*) It is believed that the rule to show cause never issues in England, if the contempt appear upon the record. (*e*) The report of the Commissioner is conclusive as the ground of an attachment. (*f*) *Hook* ought to have shown why the order ought not to have been complied with; because it is settled that, unless exceptions be particularly pointed out, the report of the Commissioner will stand confirmed of course. (*g*) The sequestration issued properly. (*h*) The return of the Sheriff, who is the only officer known in our laws, to execute process, is equal to that of a Sergeant at arms. This is a mere fanciful officer; and his services would have been dispensed with in England, had not the Court, on his complaining of the innovation which deprived him of his fees, agreed to continue

(*d*) 1 *Howard Excheq. Prac.* 778. *Har. Ch. Pr.* 661.
(*e*) *Gilb. Forum Romanum*, 70. 81. 1 *How. Excheq. Prac.* 736.
(*f*) *How. Exch. Prac.* 800. 2 *Comyn's Dig.* 223. 2 *Fowl. Excheq. Prac.* 297, 298. 3 *P. Wms.* 142. *note B.*
(*g*) 3 *Call*, 22 *Ibid.* 382.
(*h*) *Gilb. For. Rom.* 85. *Hinder's Prac.* 136. 1 *How. Excheq. Prac.* 774.

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the old process, for his benefit alone. (*i*) The books of practice in England prove that, on a return of *non est inventus* on an attachment, a sequestration issues. (*k*) The difference between process before and after appearance or judgment is laid down in 5 *Bac. Abr.* 239. *Cro. Ja.* 577. 5 *Com. Dig.* 632. *Barnes's Notes* 322. *Solicit. Guide*, 486. There was no necessity for a specifick order for *Hook* to produce the books; because it is the constant order of the Court that the Commissioner has a right to require whatever is necessary to enable him to take the account. As to the precipitancy which had been complained of, it would be seen that the cause had been depending more than three years; and as *Hook* had, in no stage of the business, except when he was under the operation of process of contempt, come forward to show cause against any of the orders taken in the cause, the presumption is, that he thought them right, as they in truth were, and according to the settled practice of the Court.

(*i*) *Preced. in Chan.* 553.
(*k*) 1 *Har. Ch. Prac.* 254.

With respect to the claim for compensation to *John F. Price*, it was contended by the counsel of *Ross* that it was just and proper. All that the sequestrators could do was to ascertain, from the records, and from other information, that *Hook* possessed certain property. But the property could neither be identified sufficiently, nor could it be collected without the aid of some person, who had some knowledge of its situation. The services of *John F. Price* were, therefore, necessary to enable the sequestrators to perform their duty, and the sum allowed very reasonable.

Thursday, *June 25th*, the Judges delivered their opinions.

What are the regular proceedings whereon to ground a writ of sequestration.

Judge TUCKER. I shall at present only notice that part of the decree which relates to the order of sequestration and the expenses attending it, which *Hook* was directed to pay; and which, if the order of sequestration was regular, he was bound to pay.

That *Hook* was in contempt for not obeying the order of October, 1800, I think unquestionable from the particulars noticed in the Commissioner's report: I therefore hold the order for the attachment for such contempt to have been perfectly regular, that being the first process of contempt; (2 *Sol. Guide*, 511.) and generally obtained of course, on affidavit (*Ibid.* 512.) and the Sheriff is the proper officer to execute it. (*Ibid.* 515.) And if he returns a

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non est inventus, thereon, an attachment with proclamations issues. (*Gilb. Ch.* 35.) Upon this process two returns may be made; either a *non est inventus*, upon which an attachment with proclamations issues *of course*, or a *Cepi Corpus:* if he returns the latter, the next step is a *Habeas Corpus* to bring up the body; for the Sheriff cannot carry him out of his county. (*Gilb. Ch.* 70.) And, if, upon an attachment for not performing a decree, the Sheriff returns *Cepi Corpus*, and lets the party to bail, (which he should *not do*, where the writ is marked for the execution of a decree,) there a sequestration is granted immediately. (*Ibid.* 191.) So, if he be brought up by *Habeas Corpus*, and will not perform the decree, but obstinately lies in prison. (*Ibid.* 191, 192. *Ross v. Colvile*, 3 *Call*, 382.) If upon an attachment with proclamation, the Sheriff return *non est inventus*, a commission of rebellion issues; and, if upon that, a *non est inventus* be returned, the *Sergeant at arms*, who is the immediate officer of the Court, is sent to seek him. (*Gilb. Ch.* 35.) And this officer our law expressly authorizes the Court to appoint. (*L. V.* 1794. *C.* 64. *S.* 10.) And he may execute the order of the Court in any part of the State, where the party may be found, which the Sheriff *could not;* and he might also, as I conceive, bring up the body of the party in contempt, without committing him to the Jail of the County, and waiting for a *Habeas Corpus*, as the Sheriff must. After all this process, if a *non est inventus* be returned, a sequestration issues. (*Gilb. Ch.* 35, 36.) All this is analogous to the process to compel an appearance as detailed and explained. (*Gilb. Ch.* 18, 77.) And when once a defendant is in contempt, he must clear it before he can be heard. (*Ibid.* 34, 216.)

According to these authorities (there being no express direction in our laws upon the subject,) the order of sequestration was premature and irregular. And had *Hook* appealed from it he might have reversed it. But, instead of appealing, he made a voluntary offer to execute the deed of trust for performing the decree, upon which the sequestration was superseded. But his subsequent conduct was equally contumacious as it had been before; and therefore he is not entitled to the favour of the Court. But the sequestration being irregular, he ought to be relieved from paying *all* the expenses of it, and from paying those of *John F. Price*, the plaintiff's agent: but the regular expenses of the sequestration ought to be borne between the parties, for the reasons stated in the decree, in which I concur with the Court.

Judge LYONS was of opinion that the sequestration was improperly awarded.

Judges FLEMING and ROANE did not express thir sentiments upon that point, except so far as they concurred in the following opinion, which was entered as the decree of the Court.

"This day came the parties by their counsel, and the "Court, having maturely considered the transcript of the "record of the decree aforesaid, and the arguments of "counsel, is of opinion that the said decree is erroneous "in this, that it doth not direct a specifick performance of "the contract of compromise concluded between the par-"ties on the thirtieth and thirty-first days of March 1795, "so far as it was in the power of the Court to decree the "same—THEREFORE, IT IS DECREED AND ORDERED, "that the said decree BE REVERSED AND ANNULLED, ex-"cept so far as it may be affirmed by the decree of this "Court hereafter pronounced; and that the appellee pay "to the appellant his costs by him expended in the pro-"secution of his appeal aforesaid here—And the Court "not approving of the special order of sequestration "made by the Court in this cause, upon the return of "*not "found*" made on the attachment theretofore issued against "the appellant, *John Hook*, for his contempt in refusing "to attend the Commissioner, pursuant to a former order "of that Court, which, according to the established course "of proceeding in courts of equity, was wholly irregular; "nor approving of so much of the said decree as directs "the appellant to pay all the expenses incurred in the "execution of that irregular proceeding, including the "compensation due to *John Fleming Price* (who appears "to this court to have been the special agent of the appel-"lee *David Ross*) for the services rendered by him on "the same occasion; doth, for these reasons, SO FAR RE-"VERSE AND ANNUL THE SAID DECREE; yet considering "that the said *John Hook* might, if so disposed, have "appealed from the said order of sequestration, and that "both his former and subsequent contumacy, and con-"cealment of the information which he was bound to "have given, do not entitle him to the favour of a Court "of Equity, and also considering the deed of trust volun-"tarily tendered to the Court, and executed by him, to "obtain a removal of the said order of sequestration, as "furnishing at this time the most effectual means of en-

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"forcing his compliance with the decree which this Court "is about to make, IT IS THEREFORE DECREED AND OR- "DERED by the Court that all the expenses which were "incurred in the execution of the said order of seques- "tration; (except the allowance made to the said *John* "*Fleming Price* for his services) be paid, the one half by "the said *John Hook*, and the other half by the said *David* "*Ross;* and that the said *David Ross* do moreover pay the "expenses of the said *John Fleming Price* his agent. And "this Court proceeding to pronounce such further decree as "the said Superiour Court of Chancery should have pro- "nounced, IT IS FURTHER DECREED AND ORDERED that, "unless the appellant *John Hook* do and shall, on or before "a certain day to be appointed by the Superiour Court of "Chancery for the Richmond District, make out and render "upon oath, or other satisfactory evidence, to the said Su- "periour Court of Chancery or the Commissioner thereof, if "directed to do so by that Court, a fair schedule of every "species of property in lands, monies, slaves, goods, debts, "and chattels of every kind whatsoever, which he had in "possession, or any other person for his use, or to which he "was entitled by any bargain, contract, claim, or demand "whatsoever, either in law or equity, on the thirtieth day "of March 1795, with the exceptions, and those only, "particularly mentioned and enumerated in the indenture "of compromise made and concluded between the parties "on that day, and do also make out and render, upon oath, or "other satisfactory evidence as aforesaid, a fair, just, and "true inventory of the new goods on hand and in the "possession of the said *John Hook*, or any other person "for his use, on the thirty-first day of March 1795, and "debit himself therewith in account with *Ross* and *Hook* "at the first cost and charges; and a like inventory of the "remains of the old goods, then also on hand, as aforesaid, "and debit himself therewith as he shall in his conscience "judge them to have been worth, according to their quali- "ty; and a like inventory of all the rye then on hand, as "aforesaid, and debit himself therewith at the rate of two "shillings and nine pence per bushell, according to the "true intent and meaning of a supplementary agreement "between the parties made and concluded the thirty-first "day of March 1795 aforesaid; and do, moreover, make "out and render upon oath or other satisfactory evidence "as aforesaid, a just and true account of all his dealings "and transactions from the day and year last mentioned "to the twenty-fifth day of December 1795, including

"both days, so far as the same, according to the true in-
"tent and meaning of the said indenture of compromise,
"and the supplementary agreement concluded between
"the said parties, on the thirtieth and thirty-first days of
"March 1795 respectively, were made for the benefit, or
"on the joint account of the said *Ross* and *Hook;* inclu-
"ding in such account a just and true roll or list of all
"lands, tenements, slaves and their increase, with their
"respective prices and cost, which, he the said *John Hook*,
"hath acquired or is entitled to, either in law or equity,
"by virtue of any land warrant or warrants acquired, or
"by virtue of any bargain, contract, or purchase whatso-
"ever, made or concluded with any person or persons
"whatsoever, at any time before the twenty-fifth day of
"December 1795, or on that day; together with a just
"and true account of the rents, issues, profits, hire, or
"annual value of the labour of the slaves and lands, with
"the increase of the slaves, if any, to the satisfaction of the
"said Superiour Court of Chancery, so as to enable the
"said Superiour Court of Chancery or the commissioner
"thereof to make and state a fair and just account thereof,
"and to direct and make a fair and equitable dividend of
"the same between the parties, according to the true intent
"of the compromise and agreement between the parties be-
"fore mentioned;—so much of the decree of the said Supe-
"riour Court of Chancery, pronounced on the twenty-fourth
"day of March 1802, as declares the balance due from the
"said *John Hook* to the said *David Ross* to amount and be
"equal to sixteen thousand, three hundred and forty-seven
"pounds four shillings and seven pence halfpenny, with in-
"terest on the balance of the principal money (being twelve
"thousand, two hundred and twenty-nine pounds, twelve
"shillings and two pence three farthings,) from the first
"day of January 1802, until the said twenty-fourth day
"of March 1802, with the costs incurred by the plaintiff
"in prosecuting his suit, exclusive of the expenses incur-
"red in executing the order of sequestration and of the
"compensation due the said *John F. Price* the agent of
"the plaintiff as herein before mentioned BE AFFIRMED;
"and that *Andrew Donald*, *William Mitchell* of *Liberty*,
"*Thomas Lumpkin*, *Samuel Hancock* and *Joseph Dicken-*
"*son* all of *Bedford* County, and *James Penn* of *Campbell*
"County, or the survivor or survivors of them, or a ma-
"jority of such survivors, or such other person or persons
"as the said Superiour Court of Chancery shall appoint
"for that purpose, do thereafter proceed to make a fair

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" and equitable dividend and allotment between the par-
" ties of all and singular the lands, slaves, and their in-
" crease and other property comprised or intended to be
" comprised in the indenture of compromise concluded
" between the parties on the thirtieth day of March 1795,
" with the exceptions therein mentioned, and such as may
" be contained or meant to be contained in the supple-
" mentary agreement concluded also between the parties
" on the succeeding day, so far as the same have, or shall
" come to the hands, possession, or knowledge of the said
" commissioners aforenamed, or such others as may be ap-
" pointed by the said Superiour Court of Chancery; and that
" they do allot, assign, appoint, deliver, transfer, and con-
" vey to the said *David Ross*, his heirs, executors, and ad-
" ministrators, two third parts of all and singular the said
" lands, tenements, slaves, and other property, according
" to the quantity, quality, and value of the same, as his
" share or dividend of the capital stock of the coparner-
" ship of *Ross* and *Hook*, and allot the remaining one third
" part to the said *John Hook*, his heirs, executors, and ad-
" ministrators; debiting the said *David Ross* with the
" lands, slaves, and other property in his dividend, accor-
" ding to the true value thereof, as an offset or discount
" against the said sum of sixteen thousand, three hundred
" and forty-seven, pounds four shillings and seven pence
" halfpenny, with the interest thereon pronounced to be
" due to the said *David Ross*, by the decree of the Supe-
" riour Court of Chancery aforesaid: and, if, after such
" dividend and offset made, any ballance shall remain due
" to the said *David Ross* from the said *John Hook*, then
" the person or persons, by whom such dividend and offset
" shall be made, or any two or more of them, shall pro-
" ceed to sell and convey so much of the lands, slaves, and
" property allotted by them to the said *John Hook* for his
" dividend as aforesaid, or so much of the lands, slaves,
" and personal estate, comprised, meant, or intended to be
" comprised in the indenture of trust made and concluded
" between the said *John Hook* of the one part, and the
" said *Andrew Donald*, *William Mitchell*, of *Liberty*; *Tho-*
" *mas Lumpkin*, *Samuel Hancock*, and *Joseph Dickenson*,
" all of *Bedford* County, and *James Penn* of *Campbell*
" County, in such manner as the said Superiour Court of
" Chancery shall direct, as may be sufficient to discharge
" the said balance, and that the same be paid to the said
" *Ross* in satisfaction of the said decree, and in full of the
" demand stated in his bill: and, in case the lands, slaves,

"and property so to be sold to make up such balance, "shall prove insufficient to discharge the same as afore- "said, that then, and in that case the said *John Hook* do "pay the balance thereafter remaining to the said *David* "*Ross*; and that the said *John Hook* do moreover, at "such time, or times, and in such manner as the said Su- "periour Court of Chancery shall direct, make and exe- "cute, or cause to be made and executed, a good and suf- "ficient conveyance or conveyances in law and equity, "according to the nature of his estate and interest in the "lands, tenements, slaves, goods, and chattels which shall "and may be appointed to the said *David Ross* for his "dividend and proportion of the same, with a special "warranty for the same, according to the tenor and effect "of the said indenture of compromise: and that the said "*David Ross*, on his part, do execute and deliver to the "said *John Hook* such a guarantee at the said Superiour "Court of Chancery shall direct, for securing the said "*Hook* against all debts contracted in Great Britain on "behalf of the said *Ross* and *Hook*, and also for any con- "tract made by the said *John Hook* for account of *Ross* "and *Hook*, or by the said *David Ross* for the same ac- "count. And that so much of the residue of the said "decree pronounced by the said Superiour Court of "Chancery as is not contrary to this decree, BE LIKEWISE "AFFIRMED. But in case the said *John Hook* shall, upon "oath or other satisfactory evidence, render to the said "Superiour Court of Chancery, to the satisfaction of the "said Court, a fair and just schedule, inventories, and "accounts, as herein beforementioned, so as to enable the "said Superiour Court of Chancery or the Commissioner "thereof to make and state a fair and just account between "the parties, and to direct and make a fair and equitable "division of the capital or joint stock of the said *Ross* "and *Hook*, and to adjust and settle the accounts between "them, finally, according to the true intent and meaning "of the compromise and supplementary agreement be- "tween the said parties herein beforementioned, then "and in that case so much of the decree of the said Supe- "riour Court of Chancery, pronounced on the twenty- "fourth day of March 1802, as declares the balance due "from the said *John Hook* to the said *David Ross* to "amount and be equal to sixteen thousand, three hundred "and forty-seven pounds, four shillings and seven pence "halfpenny, and as directs the payment of the same by "the said *John Hook* to the said *David Ross* with interest

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" on twelve thousand, two hundred and twenty nine " pounds, twelve shillings and two pence three farthings " part thereof, or, in default of such payment by the said " *John Hook*, as directs the sale of the lands, slaves, and " other property comprised or intended to be comprised " in the indenture made the fourth day of December 1804, " between the said *John Hook* of the one part, and *Andrew* " *Donald* and others of the other part, or so much thereof " as may be sufficient to satisfy that decree, by commis- " sioners therein after named, in manner therein prescri- " bed, and that the money to be produced by such sale be " paid to the said *David Ross*, in satisfaction of the said " decree, and of the demands in his bill, and the sur- " plus of the proceeds, of the sale, if any, be paid to the " said *John Hook*, and if the proceeds thereof, together " with the sums secured by the bonds taken by the seques- " trators for property sold or slaves hired out by them, " under a prior order of that Court, shall prove insuffi- " cient for the discharge of the sums of money, interest, " expenses and costs therein directed, that, in that case, " the said *John Hook*, do pay the balance to the said " *David Ross;* and as appoints commissioners to execute " that decree, BE REVERSED AND ANNULLED; and that the " commissioner of the said Superiour Court of Chancery, " or such other person as that Court shall appoint, do " thereafter proceed to state an account of all payments " made by the said *Hook* to the said *Ross*, since the thir- " tieth day of March 1795, and do moreover form a roll " or list of the lands and tenements whereof the said *John* " *Hook* was seised on that day, or which he hath acquir- " ed, or is entitled to, either in law or equity, by virtue of " any land warrant or land warrants acquired, or any bar- " gain, sale or contract whatsoever, made or concluded by " the said *John Hook* with any person or persons whatso- " ever, at any time before the 25th day of December " 1795, or on that day, with the exceptions, and those " only, mentioned in the deed of compromise concluded " between the parties on the thirtieth day of March, " 1795, together with an inventory of the slaves and " their increase, monies, goods, debts, and chattels, " constituting the capital or joint stock of the said *Ross* " and *Hook* on that day, according to the true intent and " meaning of the said compromise, with an estimate of " the said lands and slaves, and an account of the said " goods, old and new, and rye then on hand, according " to the true intent and meaning of the supplementary

" agreement concluded between the parties on the thirty " first day of March 1795; and also an account of the " profits of that copartnership from the said thirtieth day " of March 1795, to the twenty-fifth day of December " following, including both days; excluding from that ac- " count any profit which the said *John Hook*, may have " made on the new or old goods, or rye on hand on the " thirty-first day of March 1795, which, according to the " terms of the supplementary agreement of that day, be- " came his private property, from the time he may have " taken an inventory thereof; together with an account of " the rents, issues, hire, and profits of the lands and slaves, " either in the hands of the said *John Hook*, or of the " sequestrators appointed by a former order of the said " Superiour Court of Chancery, with the sums secured " by the bonds taken by the sequestrators, for the proper- " ty sold, or the slaves hired out by them under that or- " der; and state a final account between the parties, " crediting the said *David Ross* with two third parts, and " the said *John Hook* with one third part of the said " capital or joint stock, and debiting each with whatsoe- " ver he hath received or may receive, on a division " thereof, as hereafter directed, in lands, slaves, and other " specifick property, or in money or otherwise, on ac- " count of his proportion or share thereof; and that the " said lands, slaves, and other specifick property, and the " debts due to or belonging to the said capital or joint " stock, be divided and apportioned by commissioners to " be appointed by the said Superiour Court of Chancery, " according to quality, quantity, and value, between the " said parties; assigning to the said *David Ross* two third " parts, and to the said *John Hook* one third part of the " same, and, after such division and allotment made, that " the said *John Hook*, upon receiving from the said *Da-* " *vid Ross* such a guarrantee as the said Superiour Court " of Chancery shall direct to be executed by him for se- " curing the said *Hook* against all debts contracted in " Great Britain, on behalf of the said *Ross* and *Hook*, " and from any contract made by the said *John Hook* for " account of *Ross* and *Hook*, or by the said *David Ross*, " on the same account, do seal, execute, and deliver, or " cause to be executed and delivered to the said *David* " *Ross*, at such time or times, and in such manner as the " said Superiour Court of Chancery shall direct, a good " and sufficient conveyance or conveyances, assignment " or assignments, in law and equity, according to the " nature and interest which the said *John Hook* hath

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" or may have in the lands, tenements, slaves, goods, " chattels, debts, with the bonds or other securities for " debts, which may be appointed and allotted to the said " *David Ross* for his dividend and proportions of the said " capital or joint stock of *Ross* and *Hook*, with a full and " special warranty for the same, and do deliver peaceable " possession of the same: and that the said *David Ross* " be debited with the lands, slaves, and other specifick " property, so as aforesaid comprised in his share or divi- " dend, and assigned; conveyed, transferred, and delive- " red to him in pursuance of such division, according " to the true value thereof, in the estimate and account " herein before directed to be made, as an offset or dis- " count against his proportion of the said capital or joint " stock of *Ross* and *Hook*, and also with all payments made " to him by the said *Hook*, or, on his behalf at any time, " since the 30th day of March 1795. And if, after such " dividend and offset, or discount made, any balance shall " remain due to the said *David Ross* for his share of the " said capital or joint stock, or of the rents, issues, hire " and profits of the lands and slaves, that the same be paid " to the said *David Ross*, out of the monies received by, " or secured by the bonds taken by the sequestrators ap- " pointed by the said Superiour Court of Chancery for " property sold, or slaves hired out by them under an or- " der of the said Court, if sufficient for that purpose, exclu- " sive of the expenses and costs (except as herein before " excepted) by the decree of the said Superiour Court of " Chancery directed to be paid thereout; but, if the same " shall prove insufficient for the discharge thereof, that, in " that case the said *John Hook* do pay the balance to the " said *David Ross*; and in case of failure or default on the " part of the said *John Hook* in making such payment, " then the Commissioners, who shall be appointed by the " said Superiour Court of Chancery, to carry this decree " into effect, or such of them as the said Court shall di- " rect, shall proceed to sell, in such manner as the Court " shall direct, and convey so much of the lands, slaves, and " personal property which may be allotted to the said " *John Hook*, for his dividend, as aforesaid, or so much " of the lands, slaves and personal estate comprised or " meant to be comprised in the indenture of trust execu- " ted the fourth day of December 1801, between the said " *John Hook* of the one part, and *Andrew Donald* and " others of the other part, as may be sufficient to discharge " the said balance; and that the same be paid to the said

" *David Ross* in full satisfaction of all the demands stated " in his bill, and, in case the lands, slaves and other pro- " perty, so to be sold to make up such balance, shall prove " insufficient to discharge the same, as aforesaid, then the " said *John Hook* shall pay the balance thereafter remai- " ning, to the said *David Ross*. But, if upon such final " settlement and adjustment of the accounts between the " parties, as herein before directed, any balance shall be " found to be due from the said *David Ross* to the said " *John Hook*, the same shall be paid to the said *John* " *Hook*, in like manner as any balance which may be " found to be due to the said *David Ross* is herein direc- " ted to be paid to *him*. And that the said *John Hook* do " pay the costs incurred in the Superiour Court of Chan- " cery, except as herein before excepted. And that, upon " the said *John Hook's* performing this decree, the said " indenture of trust, made on the fourth day of December " 1801, be delivered up to him to be cancelled. And so " much of the decree of the said Superiour Court of " Chancery, as is not contrary to this decree, IS HEREBY " AFFIRMED. And the cause is sent back to be proceeded " in, in that Court according to the principles in this decree.

" Which is ordered to be certified to the said Superiour " Court of Chancery."

VANMETER and others *against* FULKIMORE.

Monday, 15th June.

This was an appeal from a Judgment of the District Court of *Hardy* rendered in an action of debt upon a bond.

If an office judgment be set aside and the suit defended by the appearance bail, and he afterwards waives his plea, judgment is to be entered against the defendant as well as the bail.

An office judgment was obtained against the defendants, and their appearance bail, at the rules held in the Clerk's office, in *October* 1805. At the *May* term 1806, the entry on the record is, " on the motion of the *defendants*, by " their Attorney, the office judgment is set aside: and, " thereupon, the *appearance bail* pleaded payment, upon " which issue was joined." At a subsequent term the appearance bail waived his former plea, and judgment was entered against the *defendants* and the *appearance bail*, for the debt, &c.

It was stated to have been the uniform practice of the old General Court, where the appearance bail defended

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the suit, as in this case, to suspend the conditional judgment against the principal, till a final judgment was obtained against the appearance bail.

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Judge TUCKER observed that, if there had been a confession of judgment by the appearance bail, it might well be doubted whether it would not have been errour to enter a judgment against the principals; on the principles of the case of *Fisher* and others *v. Riddell*,* decided in April 1805. But the bail, having waived his former plea, left the defendants undefended; and therefore the Court was warranted in entering up judgment against them.

By the whole Court, judgment affirmed.

* The case of *Fisher* and others *v. Riddell* was this. After a conditional judgment, the defendants appeared by attorney, and set it aside, and confessed a judgment. The plaintiff then proceeded to a judgment against the appearance bail. This judgment was reversed by the Court of Appeals; because the conditional judgment having been set aside, and the defendants having appeared by their Attorney and confessed the plaintiff's action, the appearance bail was thereby discharged, and no judgment ought to have been rendered against him.

Tuesday, 16th June.

KEY's executors *against* LAMBERT, representative of *Harmer*.

In bills in Chancery brought for discovery and for a conveyance of land or other estate, all persons interested in such land, or other estate, ought to be made parties.

On an appeal from a decree of the High Court of Chancery.

This cause was very ably and elaborately argued by *the Attorney General and Hay* for the appellants, and by *Randolph* for the appellee, on various points; but the Court, *without giving any opinion on the merits*, having reversed the decree of the Chancellor on the ground of a want of proper parties, defendants, and remanded the cause to the Court of Chancery for further proceedings, it will be unnecessary to state more of the case than that part which has relation to the point on which the Court did decide.

A suit in Chancery for a conveyance of land in case the defendant dies before a final

The bill was brought by *Harmer* against *Martin Key*, the appellants' testator, for a discovery, and (among other things) for a conveyance of two tracts of land which, it was alleged, he had purchased with the money of *Harmer*,

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(under whom the appellee claimed,) and for *his* use, but had taken the deeds in his (*Key's*) own name. Pending the suit, several abatements took place by the death of the complainants, and process was awarded to revive in the name of their representatives. At length *Martin Key* died, and the writ has revived against his *executors*, without making his *heirs* or *devisees* parties. The Chancellor decreed the two tracts of land to be conveyed to the complainant, &c.; directed the payment of the rents and profits, and also the amount of an account which had been stated, by referees chosen by the parties during the progress of the cause, as a balance due from *Martin Key*, in his lifetime to *Harmer*.

decree ought to be revived against his heirs and devisees, and all other persons holding, claiming, or in any manner interested, under him, in the land in question.

The Court,* (consisting of Judges LYONS, FLEMING, and ROANE,) after taking time to consider, on *Friday the 26th of June*, delivered the following opinion.

"That in bills brought for discovery and for a convey-
"ance of land or other estate, all persons interested in
"the land or other estate prayed to be discovered and
"conveyed, ought to be made parties thereto; and, the
"bill in this cause being brought for a discovery and a
"conveyance of land said to have been purchased by
"*Martin Key* for the use of *John Harmer*, under whom
"the appellee claims; and *Martin Key* the defendant to
"the original bill being dead; by which the original suit
"abated as to him; that his heirs and devisees, and all
"other persons holding, claiming, or in any manner in-
"terested under him, in the lands mentioned in the ori-
"ginal bill ought to have been made parties defendants
"to the bill of revivor filed in this cause, before a final
"decree was pronounced therein; and, that not having
"been done, this Court, without giving any opinion on
"the merits of the said cause, considers the decree as
"erroneous, &c."—Decree reversed, and cause remitted to the Superiour Court of Chancery for the Richmond District, with leave to the appellee to amend the bill of revivor and add proper parties, and for further proceedings, &c.

* Judge TUCKER, did not sit in this cause, as it involved a point which occurs in another cause depending in this Court, in which, from his relationship to one of the parties, he could not sit.

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NICHOLAS'S Executors *against* TYLER.

Friday, 19th June.

On an appeal from a decree of the Superiour Court of Chancery for the *Richmond* District pronounced by the late Chancellor.

A bond given in the paper money times is not subject to the scale of depreciation, if it can be shown by circumstances, though not appearing on its face, that the debt out of which it grew was originally payable in specie.

The case was this. Before the revolution, certain property of *Philip Johnson* was vested by an Act of Assembly in trustees, of whom *Robert Carter Nicholas*, the testator of the appellants was one, for the purpose of being sold; and after certain specifick appropriations, the residue of the money arising from the sales, was to be lent out on such security as the General Court should direct. The trustees were authorized to sell on credit. In *November* 1771, *Robert C. Nicholas*, as the principal and acting trustee, sold part of the property (consisting of houses and lots in *Williamsburg*,) to *Mann Page*, for £ 803, and took his bond for that sum. *Page* sold a part of this same property to *John Hatley Norton*, for £ 600; at what precise time does not clearly appear; but on the 6th of *March*, 1777, *Norton* with *Robert C. Nicholas* his surety, executed a bond to two other of *Johnson's* trustees for the said sum of £ 600; and, in an account rendered, on the 2nd of *April* 1778, by *Robert C. Nicholas*, between "*Mann Page*" and "*Philip Johnson's* trustees," *Page* is credited "by *John H. Norton*, for his bond of £ 600," and by "ditto for two years interest on it." On the debit side of the account, *Page* is charged with his bond of £ 803, in *November* 1771; and annually, in *January* 1773, 1774 and 1775, he is charged with interest on the whole amount; but, in 1776, and 1777, he is charged with interest on £ 203 only. At the closing of the account in 1778, he is charged with "two years interest on £ 600, the sum *Mr. Norton* was to pay;" but he is, at the same time, credited by *John H. Norton* for his bond of £ 600, and for two years interest on it as abovementioned.

In a former suit, brought for the purpose of settling the above trust, and of determining the proportion to which each claimant was entitled, in which suit the representatives of *Philip Johnson* and the executors of *Robert Carter Nicholas* were parties, it was decreed that this bond executed by *John H. Norton* and *Robert Carter Nicholas* should be assigned to *Tyler* the present appellee. *Nicholas's* executors and *Tyler*, differing in opinion, as to the mode in which this bond should be settled, whether it was subject to the scale of depreciation or not, the exe-

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cutors gave their own bond to *Tyler* on the 11th of February 1801, for the full amount of principal and interest; but, by a stipulation in writing endorsed thereon, they reserved the right to discuss the question whether the bond in which their testator was surety for *Norton*, and which was the foundation of this bond, was liable to the scale of 1777; and it was further stipulated that *Tyler* should be at liberty to avail himself of any facts (not set forth in the bond of *John H. Norton*, and *Robert Carter Nicholas*, to *Johnson's* trustees) which, according to law and the practice of the Courts, might affect the decision.

The Chancellor was of opinion that the bond of *Norton* and *Nicholas*, though executed in 1777, was not, from the peculiar circumstances of the case, liable to the scale of depreciation; and decreed accordingly.

The Attorney General, for the appellants, after stating the case, observed that the only question was, whether the bond executed by *Norton* and *Robert Carter Nicholas* the testator of the appellants, in 1777, was liable to the scale of depreciation; and, if liable, at what time the scale should be applied. He contended that there were no circumstances in this case which exempted the bond from the general operation of the scale as of the date when it was given. The presumption is, that *Page* and *Norton* were in treaty for the property sometime before the bond was executed; that *Norton* was to have it, if he could obtain a credit with the trustees for the amount of the purchase money; but that, until the credit was actually obtained, he was not entitled to it. This appears from the date of the bond, to have been done in 1777; of course the credit is to be entered under that date. It is true that, in 1778, *Page* is credited by two years interest paid by *Norton*; but the probability is, that *Norton* having previously made the contract with *Page*, advanced the interest from the time when it was first entered into.

It will not be denied that the trustees had power to sell on credit; and that *R. C. Nicholas* had full powers from the other trustees to act. If a bond as good as *Page's* were offered to him, he had a right to take it. What difference is there between receiving the money and loaning it out, and taking a bond bearing interest? the effect would be the same. If he had taken a bond for money loaned there would have been no question but that it would have been liable to the scale. *Robert C. Nicholas* was substantially performing what was required by the Act of Assembly.

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It made no difference that he was a party to the bond, because the security was not lessened. It has not been, nor can it be alleged that he was not perfectly solvent.

The decree of the Chancellor, by which this bond is directed to be assigned to the appellee, recognizes it, as a proper transaction of the trustees. It may be said that it grew out of another which existed anteriour to the scale of depreciation. But, if the power of the trustees to loan the money be admitted, then we must look at the date of the bond for the time when the scale is to be applied. Suppose the suit had been brought against the executors of *John H. Norton*, could it be said that the debt would not have been subject to the operation of the scale? If this would have been the case as to his executors, the same rule ought to be observed with respect to his security. Suppose the estate of *Robert C. Nicholas* should be compelled to pay the debt, as the security of *John H. Norton*, could his executors recover more than according to the scale?

The decree of the Chancellor is founded on a very extraordinary exposition of the statute. The law lays it down as a general rule that the scale is to be applied as of the date of the contract; but the 5th section authorizes the court to judge from the whole circumstances of the case whether a determination according to the scale would be just or not. (See Laws of Virg. Chan. Rev. 147). The Chancellor completely reverses the Act of Assembly, and makes the exception the general rule, and the general rule the exception. He says that no contract shall be intended to fall within the operation of the scale, unless it shall appear that the parties so contemplated: thus throwing it on the debtor to prove that the scale was not intended to operate; whereas the statute expressly says that, except where the payment was to be made in specifick articles, or the operation of the scale, from all the circumstances, would be unjust, it shall be applied. In the case of *Ambler v. Wild*, (2 *Wash.* 36) it is said by the President in delivering the opinion of the court, (pa. 42) that "it was not the intention of the Legislature to let men loose from their contracts, but to allow a departure from the established scale, in cases where it was necessary, in order to meet the real contract of the parties."—*Bogle* &c. *v. Vowles* (1 *Call*, 244) is analogous to this case. There a party was indebted in 1776, and in 1777 executed a bond for the amount. Yet the Court would not let in evidence to prove the origin of the transaction. In *Call v. Ruffin*, (1 *Call*, 334) the

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penalty of a guardian's bond was scaled. The Chancellor in the case before us goes upon the supposition that it was a specie debt due from *Page*. But this is mere supposition. It is true the contract was entered into before the scale of depreciation. But, if a man owed a debt before the scale, he had a right to pay it in paper money; and if a party gave a new bond it was still liable to the scale. This circumstance on which the Chancellor seems to have relied, is stated by this Court to have no influence. See *Wilson* and *M'Rae v. Keeling* (1 *Wash.* 194). He also cited *Taliaferro v. Minor* (1 *Call* 524.) and *Walker* &c. *v. Walke* (2 *Wash.* 195.) Notwithstanding the hardships complained of in all these cases, yet the scale has been invariably applied, unless it appeared that the parties contemplated a specie transaction.

Call, for the appellee. If the transactions which occurred in this case had appeared upon the face of the bond itself, there could have been no doubt on the subject. So, if it can be shown from the circumstances that the debt, out of which the bond grew, was originally payable in specie, it is equally clear that it is not subject to the scale of depreciation. Cases innumerable have been decided, on this point. They began with *Pleasants v. Bibb* (1 *Wash.* 8) and ended with *the Commonwealth v. Walker's exor.* (*Hening* and *Munford* 144.) The case of *the Commonwealth v. Walker's exor.* is very peculiar. There the money was paid into the treasury in 1777 and 1778; and the certificate of those payments carried to the Governour in 1779, who gave a different certificate for the amount, as for so much paid in discharge of a British debt. A new document was given by the Governour, and the old document was no longer in the power of *Walker*, or his executor. It was then argued, as it is now, that the date of the last instrument should alone be regarded as the time of the contract. But the Court decided that the scale was to be applied as of the date of the payments into the treasury, not of the Governour's receipt for the certificates of those payments.

It is taken for granted that, if it had appeared on the face of the instrument that this debt was originally payable in specie, there would have been no pretext for applying the scale to it. This equally appears from the proceedings in the cause. The answer of the appellants has relieved us from all difficulty with regard to the testimony out of the papers. It confesses the contract between *Page* and *Norton*, and the consequent transfer of bonds. As the de-

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fendants did not choose to rely on the estoppel created by the bond of *Norton* and *Robert Carter Nicholas* to the trustees of *Johnson* (if indeed, it would have availed them) but submitted the whole case to the Court; we are only to inquire what that case was. The contract between *Page* and *Norton* was entered into in 1776; in consequence of which two years interest from that date was paid by *Norton* to *Robert Carter Nicholas;* and, in 1777, a bond was given by *Norton* with the same *R. C. Nicholas* his security, for the amount of the sum which he agreed to pay on account of *Page* to *Johnson's* trustees, of whom it is admitted *Nicholas* was the acting one. It was acknowledged on all hands to be a specie contract, which was only meant to be secured by a bond. The agreement between the parties to this suit, endorsed on the bond, expressly enabled the appellee to insist on any circumstance which belonged to the case. If then the parties were to inquire into the nature of the contract, it would at once be perceived that it was a contract made in 1776, which was clearly for specie.

But there are other points of view in which this case may be considered, which make it equally clear that the scale ought not to be applied. In the account exhibited by the testator of the appellants, it appears that he contemplated this as the debt of *Norton* in 1776; because it is brought into the account and interest charged as of that date. Shall a trustee be allowed to change the nature of a contract in which he is a party? *Robert Carter Nicholas* (knowing all the circumstances) ought either to have taken the bond from *Norton* in lieu of *Page's*, as of the date of 1776, or recited the transfer on the face of the bond itself. He, as trustee, has surely been guilty of a fault; and if a prejudice has been produced, it ought to fall on him alone.

In another point of view this transaction affects him as a trustee. This was a voluntary act on his part. When a trustee receives *money* on account of the trust estate it is a different thing. The debtor has a right to make a tender of the money due; and the trustee, in receiving it, is merely a passive instrument. But in this case *R. C. Nicholas* was an active agent. Instead of receiving *money* from *Norton*, he accepted a bond, in which he himself became a party, and exonerated *Page* who was clearly bound to pay specie. It was in fact a continuation of the old contract.

This case falls completely within the reason of the case of *Skipwith v. Clinch* (2 *Call* 253). There a lease was ente-

red into in 1777; which not being recorded, another lease with the same covenants was executed in 1778. It was decided that the rents should be settled by the scale of 1777. The present case is to be considered as if the second bond was only a guarantee of the old debt, and the trustee himself a security. It is the same thing in a Court of Equity, as if the new bond had recited the old one, and *Nicholas's* guaranty of the payment of it.

The case of *Bogle* &c. v. *Vowles*, (1 *Call.* 244) on which the *Attorney General* seems principally to rely, has no resemblance to this. In that case there were no circumstances to guide the judgment of the court; and it might be presumed that the parties contemplated a depreciation, and made provision for it in the bond. But, in this case, no such idea can be entertained. The nature of the transaction shows that nothing like depreciation was contemplated.

We are entitled to the relief sought for, from *Nicholas's* executors, on the ground of the fiduciary character of their testator. His estate is liable for the full amount of the old bond, because he improperly converted it into the new one.

Botts, in reply. It will be admitted by the counsel on the other side, that, from the face of the bond, if nothing else appears, the scale of depreciation, ought to be applied. This being the general rule, if there be any ground for an exception, it behoves the appellee to bring his case within it. The date of the bond is explicit. The ground taken by the counsel for the appellee seems to resolve itself into this idea; that *Robert Carter Nicholas* being a trustee ought not to have taken *Norton's* bond with himself security in part payment of *Page's* specie debt. It would seem, however, from the record, that the bond was not taken by *Nicholas*, but by the other gentlemen who were associated with him in the trust. No blame can therefore attach to *Nicholas*. The trustees might undoubtedly have received the money; or, if *Norton* had become indebted to *Page*, in consequence of the purchase of any property, he might have paid the money to *Nicholas*. So, after the execution of the bond by *Norton* and *Nicholas* to the other trustees, the money might have been paid; and, as it respected *Nicholas*, he being both a trustee and a security in the bond, a payment by him would have been merely a transfer of the money from the right hand to the left. Such idle formality could not have been expected.

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Had the money been paid in any form, it must either have been lent out or retained in the hands of the trustees. Had it been retained, it would have depreciated to nothing. No fault could have been found with *Nicholas* for lending it out, if it had been paid to him by *Page*. The caution of the Legislature, in directing that the money should be lent out upon such security as the General Court should approve, related only to the solvency of the obligors. If there existed no Court at the time the payments should be made, and the trustees nevertheless took upon themselves to make a loan without the intervention of any Court, all that they could be called on to do, would be to guaranty the ultimate payment of the debt then legally contracted. To that extent there would be no question as to the liability of *Nicholas*.

It was impossible to foresee the future events which took place. It was impossible to foresee the depreciation of the paper money; nor could it have been supposed that another bond with one of the trustees as security was not better than the bond of *Page* himself.

Surely, *Robert Carter Nicholas*, having acted fairly as a trustee, ought to be protected in the same manner as any other innocent security, who could not have been liable beyond the scale at the date of the bond, although it might have been given for a preexisting debt: but, in this case, there was not sufficient evidence that the contract between *Page* and *Norton* was consummated till 1777; and therefore, the scale should be applied as of that date.

Randolph, on the same side, observed, that he understood all the cases decided by this Court to go upon the principle, that, if there were a general bond for the payment of money, and nothing on the face of it leading to an anteriour date of the transaction, no evidence should be received to show it. Nor was the case of *Skipwith* v. *Clinch* an exception. It is true the Court, in that case, carried back the transaction to 1776, although the deed on which the suit was brought was dated in 1778. But it was on the ground that the subsequent deed was a mere transcript of the former, and had been executed because the first had not been recorded. To be within the spirit of the case of *Skipwith v. Clinch*, this should have been a new bond executed by *Page*, with *Nicholas* his security.

But it is supposed by *Mr. Call* that the agreement of the appellants endorsed on their bond operates as an estoppel.

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This cannot be inferred. All that they meant was, that the case should be decided, according to *law*.

If *Norton* alone had been before the Court, there could have been no doubt: and what can make a difference as to *Nicholas*, a party in the same bond? If such a difference is to be made, it must be on the ground that some improper act is imputed to *Nicholas*, in his character of trustee. But how is he justly chargeable with any impropriety of conduct? Is there any difference beween *Page's* paying the money, and doing what he did? He paid *value*. And the question is, whether *Nicholas* shall be liable as a trustee, when he did not dream, at the time, of depreciation.

What a phenomenon in jurisprudence would it be, to say that *Norton* would not have the benefit of the scale, and yet that *Nicholas's* executors (if he had paid the money as security for *Norton*,) could only recover of *him* by the scale?

A trustee can never be liable to a penalty unless it appears that he meditated a fraud. In this case, *Nicholas* (having acted fairly and honestly, and under the advise of the other trustees,) ought to be protected.

Curia advisare vult.

Monday, June 22nd, the decree of the Chancellor was unanimously affirmed: the Court considering *Nicholas* to stand in the same situation as *Page*, and liable to pay the full amount of the bond without depreciation, in the same manner as *Page* would have been bound.

MEEK and others *against* BAINE.

Saturday, 20th June.

The appellee obtained a judgment against the appellants, on a forthcoming bond, at the District Court, held at *Washington Court-House*, on the 4th of October 1805: from which judgment an appeal was taken, at the same term, to this Court; but no record of the appeal was sent up.

More than two terms having elapsed, and the appellee having died intestate since the appeal, *Hening* moved to enter an appearance for his administrator, and to dismiss

Where two terms of this Court have elapsed, since the Appeal, and before the record is brought up, the administrator of the appellee may have the ap-

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MEEK and others *against* BAINE.

Appeal dismissed, on motion, without resorting to a *scire facias*

the appeal without resorting to a *scire facias*. He considered this case as not coming within the reason of the case of *Wood v. Webb* cited in a note to *Daniel v. Robinson's* Executors. (1 *Wash.* 154,) *There* the appeal was docketted in this Court, and the judgment might either have been reversed or affirmed; but *here*, the record not having been brought up, the appeal, according to the course of the Court, can only be *dismissed*. This was settled as the practice of the Court in *Mills v. Black*, (1 *Call*, 241,) and referred to, at the last term, in the case of *Nelson v. Matthews*. (*Hening* and *Munford*, 21.) The practice in England of suing out a *scire facias ad audiendum errores* upon the death of the defendant in errour, (1 *Salk.* 264, *Wicket* and others *v. Creamer*, and 1 *Ld. Raym.* 349, *S. C.*) has no weight in this case; because our Act of Assembly expressly directs, that, unless a transcript of the record be sent up, on or before the second term of the Court of Appeals, after the appeal shall have been granted, it shall be dismissed, unless good cause be shown to the contrary; and the Court will not intend that there is good cause, where the appellant, as far from attempting to show it, does not even prosecute his appeal.

Curia advisare vult.

Monday, June 22nd. The President delivered the opinion of the Court, (absent Judge TUCKER,) that the appeal be DISMISSED, in the common form, the entry to be on the motion of the administrator &c.

Monday, 22nd June.

EDMONDS *against* CARPENTER, Commissioner of the Revenue.

The proviso in the Revenue law of January 23d, 1799, that not above one tax should be paid by a merchant for selling goods at one and the same store, was not to be construed so as to compel the payment of separate taxes on several stores kept by the same merchant.

The only question in this case was, whether, under the Act of Assembly intitled "An Act laying taxes for the support of government," passed the 23d of *January* 1799. (*a*) A merchant keeping two retail stores in the

(*a*) Rev. Code, chap. 243, sect. 2, pa. 386. See also Sess'ns. Acts of 1797, ch. 1 sec. 4.

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EDMONDS *against* CARPENTER Commissioner of the Revenue.

same county, was compelled to take out a license for each store.* The County Court decided that a license for each store was necessary, and imposed a fine of 500 dollars on *Edmonds*, for retailing goods at one of his stores without a license; he having two stores in the same county, and but one license. From the decision of the County Court *Edmonds* appealed to the District Court, where the judgment was affirmed. The cause was brought up by a writ of supersedeas to this Court.

Wickham, for the plaintiff in errour, contended that the tax under this law was merely *personal*, nothing having been said, in the enacting clause, about a *store*. The words of the Act are "upon any *person's* producing to the commissioner of the revenue" a receipt for so much money he should grant a license in the manner therein prescribed to sell goods, &c. Nothing could create any doubt but the *proviso* to that clause, which declares that "not above "one tax shall be paid on account of so selling at one and "the same store." But he contended that a proviso, never could have the effect of enlarging a general enacting clause. Where the general words of a law are plain, we never have recourse to the proviso.

The *Attorney General*, for the defendant in errour, contended that this was clearly a tax upon each store, and not a personal tax. The license was for permission to vend certain commodities; and the *proviso* being a part of the Act must be taken into the construction of it, and is explanatory of the intention of the Legislature that a tax was to be paid for each store.

If we look into the subsequent revenue laws, (*b*) we shall plainly perceive that it was the intention of the Legislature that a tax should be paid upon each store: for the same proviso which is found in this Act goes further, and says, "and if any person shall possess two or more "stores, he or she shall pay one tax for each store." He did not say that this legislative exposition was obligatory on the Court; and he was well aware that it might be urged as an argument against the tax under the present law. But the general law and enacting clause was the same in all the acts.

(*b*) See Rev. Code, chap. 255, sect. 2, pa. 396, and every annual revenue law since passed.

* This Act was afterwards amended, and a separate tax directed to be paid for each store. See Rev'd. Code, 1 Vol. p. 396, ch. 255, sec. 2, and the subsequent revenue laws annually passed.

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Edmonds *against* Carpenter Commissioner of the Revenue.

Wickham, in reply, laid it down as a general proposition that a proviso in an act never enlarges its operation, in any case; much less in a penal law. The legislative exposition, which has been relied upon, clearly proves that they did not think this law embraced the case of a person's selling goods at two stores under one license, or they would not have changed the language of the proviso, in their subsequent revenue laws.

Tuesday, June 23d. By the whole Court, the judgment of the District Court was reversed.

Monday, 22d June.

Worsham *against* M'Kenzie.

On an appeal from a decree of the High Court of Chancery.

After a confession of judgment by an executor, in an action brought on his executorial bond, for the purpose of recovering against him and his securities for a *devastavit*, he cannot resort to a Court of Equity for relief, on the ground that he had fully administered the assets of his testator.

John Worsham, the testator of the appellant, being indebted to *M'Kenzie* by bond in which his heirs were bound, departed this life, leaving lands incumbered by a mortgage as well as a considerable personal estate under no incumbrance. These lands he devised to *William Worsham* the appellant, and made him his executor. As devisee he entered upon all the testator's real estate; and, in the character of executor, he took possession and disposed of all the slaves and personal property.

The appellee having obtained a judgment against the appellant as executor on the said bond, and issued an execution which proved unproductive, commenced a suit in the District Court of *Petersburg*, on the executorial bond, with a view to charge the executor in his own right for a *devastavit*, and, with him, the securities in the bond for his due administration of his testator's estate. At the September term 1798, the cause was continued for the defendants; and, in April 1799, judgment was confessed, with a stay of execution until the 1st of September 1799. At the expiration of this period, an execution issued on the judgment, and a delivery bond was taken, upon which judgment was confessed at April term 1800, with a stay of execution until the 1st of October then next following.

The appellant, the executor, obtained an injunction from the High Court of Chancery on the ground of a full administration of the personal assets; and assigned, as a

reason for his not relying, at common law, on the plea of *plene administravit*, that the affairs of his testator were so complicated that he did not know the state of the assets at the time when the judgment was rendered; and moreover stated that, being ruled to trial without counsel, (the late *Mr. John Thompson*, whom he had retained in the defence, having departed this life but a short time before the trial came on,) judgment passed against him unopposed.

The answer of the appellee expressed a doubt of the appellant's having fully administered the personal assets of his testator; and relied on the several confessions of judgment; and on this point also, that the appellant, as heir or devisee, was in possession of ample funds to discharge this debt.

The bill was dismissed on a final hearing, from which decree of dismission an appeal was taken to this Court.

Wickham, for the appellant. The first point meant to be contended is, that the appellant is not barred from seeking relief, in equity, by the judgment at law. This point has never been solemnly settled in this court; but it has uniformly been acted on in the Court of Chancery. Cases have frequently occurred where an executor has been relieved after a judgment at law, if it appeared that he had acted fairly and had fully administered the assets of his testator. In the Federal Court the same rule prevails, on the ground of its being the settled practice of the Courts of Chancery in this state. In the present case, it is assumed as a fact, that the executor had (before the rendition of the judgment), fully administered the estate committed to his charge. He exhibits an inventory and account of sales of the personal estate; and, though he does not produce an appraisement, yet that is immaterial, as the account of sales corrects and overrules the appraisement. The account of administration is in the common form, and has received the sanction of the County Court. When that is done, the account is always presumed to be correct. It is never the course of the Court of Chancery to require the vouchers by which the several items of an account of administration are supported. If an account be objected to, it is referred to a commissioner to examine and compare the items with the vouchers on which they are founded. By the account which has been settled by commissioners and passed by the County Court we are creditors to the amount of three hundred and fifty pounds. During the present term of the Federal Court, admini-

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stration accounts have been admitted without vouchers, and verdicts rendered for the defendants, on the plea of *plene administravit*. They should always be considered as *prima facie* evidence; and, if objected to, ought to be referred to a commissioner.

But it may be argued that the appellant confessed a judgment. This, under existing circumstances, ought not to prevent relief in equity. I will not raise the question (which seems never to have been solemnly settled) whether a previous suit be necessary against an executor, before you can sustain an action on the administration bond. Let it be admitted that the judgment at law, under the circumstances of this case, was an admission of assets, and that on a return of an execution "*nulla bona*" the executor would have been liable for a *devastavit*. If relief could then have been had in equity, his confession of judgment cannot vary the case: for the return of *nulla bona* would, at law, have had the same effect; it would have estopped the executor from saying that he had no assets. Even if, pending the suit at law, he had applied to the Chancellor for relief, he would have been compelled to confess a judgment.

Another reason may be assigned why the appellant ought not to be deprived of relief in equity. He was induced to confess a judgment under an impression that he could not defend himself at law. Counsel differed in opinion on this point; and even his own counsel was of opinion that he could not avail himself of a defence in a court of common law. It may be said, that, by obtaining a stay of execution, he undertook to pay the money in any event. But he evidently mistook his case; and it has always been held that a man shall not be precluded from relief in equity merely because he was mistaken in the conduct of his suit at law. It will be admitted that if, by a stay of execution, he had deprived the creditor of his right, he must abide by the consequences. But that does not appear to be the case in the present instance. No payments were made by him to other creditors, between the rendition of the judgment and the expiration of the time to which execution was stayed; and the assets of his testator were as sufficient at one period as at the other.

I come now to another point; the supposed liability of the appellant as devisee, in consequence of the lands given him by the will of his testator. It is admitted that, if the lands be sufficient to satisfy prior incumbrances, the surplus, if any, is assets in equity. If he is to be charged on

account of those lands, it should be as heir or devisee; and the lands should be sold for the payment of the demand; but there should be no *personal* charge. By charging the land, not more than the *value thereof* could be recovered; but by making it a *personal charge* he may be compelled to pay ten times its value; especially as it was incumbered with a mortgage which must first be satisfied.

If the appellant be entitled to relief in equity *as executor*, and be chargeable *as devisee*, then there ought to be a decree for the sale of the lands, by commissioners, and an account taken of the real and personal estate which came to his hands; because the value of those lands cannot otherwise appear. In every view of the case, the decree of the Chancellor ought to be reversed, and an account taken; and the judgment at law should stand as a security for the performance of the final decree.

Hay, for the appellee. It appears, from the documents filed in this cause, that the appellee brought a suit against the appellant as *executor*, upon the bond of his testator; and that, after a judgment and an ineffectual execution, a suit was brought on the executorial bond in which the security in the bond as well as the executor was a party. The suit progressed, and, finally, a judgment was confessed by the appellant in consequence of his agreement that he himself would pay the debt; and six months were allowed for that purpose. The time elapsed; an execution issued and a forthcoming bond was taken. At the moment when a motion was about to be made for a judgment on that bond, the executor again confessed a judgment, and obtained a stay of execution for six months longer. It is now contended that he is not bound by these two judgments deliberately rendered by himself.

Much has been said by *Mr. Wickham* to show the practice in the Chancery and Federal Courts, as to relief in cases of a fair administration. I shall not deny the propriety of this practice; but I do not see the propriety of a reference to those authorities. I never meant to say that a judgment against an executor in his executorial character deprived him of relief in equity, if he were otherwise entitled to it; but I *do say* that, when there is a suit brought against an executor for wasting the assets of his testator, for retribution out of his own estate, *his* confession of judgment is an acknowledgement that the charge of waste is true, and that he is bound both in law and equity. It is remarkable that, in this case, there was a stay

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of execution even after a judgment on a forthcoming bond; the appellant clearly manifesting in every stage of the proceedings that he considered the debt as his own. These circumstances differ the case widely from the statement made by *Mr. Wickham*. The suit in which this judgment was confessed was not against the appellant *as executor;* but against him *in his own right* to establish a *devastavit*.

But it is assumed as a fact that the appellant has fully and fairly administered the assets which came to his hands. This, it is said, appears from an account which has been returned to the county Court; and we are told that a Court of Equity will relieve in such cases where a judgment has been rendered against a man in his executorial character. This last position, though true, has no application to the case before the court. Relief is sought by the appellant not in his *representative*, but in his *individual* character; so that the executor as a party would not come within the scope of *Mr. Wickham's* own argument.

Though a Court of Equity will relieve where an executor has acted fairly, yet the rule does not apply to this case. The account exhibited by the executor has a very suspicious aspect. There is no account whatever of any credits to the estate of his testator. It is improbable that a man should have owed upwards of a thousand pounds, and that not a shilling should be due to him. Such appears to have been the case with the testator of the appellant from the account exhibited by his executor.—Again there was no appraisement of the estate. This the executor was bound to have done by the tenour of his oath and the condition of his bond. This important duty was omitted. Why?—the account of sales will answer. It will be found that ten negroes sold for three hundred and odd pounds only, and were purchased by the executor himself. It may be said, that it might have been either a good or a bad bargain; but, if there had been an appraisement, the real value of the negroes would have appeared. As the executor has not done what his duty prescribed, we are at liberty to presume against him, and to infer that the sale was a fraudulent one. That the executor committed a *devastavit* there can be no doubt. The evidence of the counsel who prosecuted the suit against him shows that the plaintiff was prepared to establish that fact, and that the confession of judgment was the effect of a compromise between them, which was proposed by the executor himself. From that moment he considered that the executor took the debt upon himself.

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It is said by *Mr. Wickham*, that the second judgment makes no difference since there would necessarily have been a judgment at law. The position is not correct. Where there is a suit brought against the executor himself, and he is the only party, the original judgment against him as executor, is evidence of assets. *Mr. Wickham* has not adverted to the distinction between an action against the executor suggesting a *devastavit*, and an action on the executorial bond. In the latter case the security is a party, and, by the express provision of the law, he is not liable beyond the assets for any omission or mistake in pleading or for false pleading of his principal. (*a*) The object of the second suit, in this case, was to *prove* a *devastavit:* and, however accurate *Mr. Wickham's* ideas may be as to the legal effect of the first judgment against the executor, *as such*, being the ground of a second judgment *against him in his own right*, the counsel opposed to the appellant did not expect to succeed on that point of law, but to obtain the second judgment, on the testimony of witnesses proving a *devastavit*. I contend that the confession of judgment, under the circumstances of this case, was a fair contract which the appellant is bound in law and equity to perform.

(*a*) Rev. Code, vol. 1, ch. 92, sec. 33, pa. 165.

But it is said, if the confession of judgment and stay of execution has deprived us of any right, the appellant must abide by the consequences. Already have we been extremely incommoded in not being permitted to go on with our action at law. We should have obtained a judgment against the appellant individually on proof of a *devastavit*. Can it be believed that the appellant, if he had been a creditor of the estate of his testator, as he represents, would have confessed a judgment, and acknowledged that he had wasted it? If we had gone on, and obtained a judgment on establishing the fact of a *devastavit*, he never could have come into a Court of Equity for relief. The counsel for the appellant in the Court of Common Law, I am well assured, never expected to succeed on the ground that there had been no *devastavit;* but only that the appellee's counsel had not brought an intermediate suit against the executor to establish the *devastavit*, before he commenced his action on the executorial bond. The celebrated case of *Braxtow v. Winslow*, (*b*) has produced much confusion, and has never been clearly understood. It would seem, from the opinion which the Court is made to express, in that case, that a *devastavit* must be established by a separate action against the executor, before you can resort to

(*b*) 1 *Wash.* 31.

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a suit on the executorial bond. But this opinion is not supported by reason; nor was it necessary for the Court to decide that point, there having been, in that case, no suit whatever against the executor even to establish the debt.

It is admitted by *Mr. Wickham* that the lands devised to the appellant are liable; but it is contended there should be no judgment against him personally. After such a length of time, it would be unreasonable to ask the appellee to resort to the land. It may not be in the possession of the appellant. But there is one circumstance which deserves consideration: it is extremely probable that, in consequence of these lands, the appellant was induced to confess judgment: especially if he had disposed of them.

But, it is said, the land was subject to a mortgage. It does not clearly appear that this was the case. There is no evidence that this is the same land. But, if it were the mortgage has probably been paid off; as there appears in the executorial account an item for money paid on account of a mortgage. It is not said for what land; but the presumption is, that it was for the land devised to the appellant.

Another circumstance deserves the consideration of the Court. The appellant repeatedly promised to pay this debt. I would ask, if this does not strengthen the conviction, that he considered himself bound to pay it?

Wickham, in reply. It is not contended on the part of the appellant that there ought to be a perpetual injunction without further inquiry; his liability for the property real and personal which came to his hands as devisee or executor is admitted. All that we contend for is that enough appears to put the Court on an inquiry as to the truth of the facts alledged by the appellant.

It is admitted by *Mr. Hay* that we were not so conclusively bound by the first judgment as to preclude us from relief in equity. He *must* admit that we were bound by it at law. I cannot, therefore, see that the confession of the second judgment made any difference: for the appellee had only to carry his first judgment into Court, with a return of *nulla bona* on the execution, and take his second judgment as a matter of course. It was consequently unnecessary to summon witnesses to prove a *devastavit which the law implied.* If the appellant had applied to a Court of Equity in the first instance, he would have been compelled to confess a judgment, before an injunction would have been awarded. As to the stay of

execution, it is admitted that if any loss had been sustained on that account it must have been borne by the appellant; and with respect to the delay, we pay interest on the debt, which the law deems an adequate compensation.

But the account is said to have a suspicious aspect. There is no proof of fraud; and *prima facie* the account is correct. It is settled in the usual form; and, if there be a suggestion of any unfairness, it is not now too late to inquire into it. The circumstance of there being no credits is easily accounted for; the testator being much in debt, probably assigned the bonds of others, payable to him, in discharge of his own debts.

Why, it is asked, was there no appraisement? This question cannot be asked here. If the appraisement were now in my pocket, I could not produce it. In Chancery it might be called for. With respect to the negroes we know nothing. Those ten sold by the executor and purchased by himself at the price of three hundred and fifty pounds, might have been very old or very young; they might have been a good or a bad bargain.

It is inferred that the appellant knew he was a debtor to the estate of his testator by confessing a judgment. What else could he have done? He was bound at law by the first judgment against him as executor; and advised that his only defence was in equity. If there had been a judgment for a DEVASTAVIT, it would have been no bar to relief; because, in the action suggesting a *devastavit*, the jury would have been bound by the original judgment. Nor does the stay of execution make any difference: for cases have gone so far, as that, where there was a *bond* given on a new contract, relief has been granted on the equity arising from the original transaction. But the land may be gone. If so, the injunction bond stands as a security. It is said too that it does not appear the land was mortgaged. This comes out in the answer. "But the mortgage may be paid." This may or may not be the case; and ought to be inquired into——"But the appellant promised to pay the debt." *Mr. Hay*, himself, (as appears from the record,) told him that he could not get relief. It was then only a promise to pay a judgment which he thought himself bound to pay. Cases are numerous where relief has been granted in equity, after a promise by the party to pay arising from a mistaken apprehension that he was bound.

Tuesday, June 23d.—The decree of the Chancellor was unanimously affirmed.

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Tuesday, 23d June.

NELSON *against* SUDDARTH, THE SAME *against* THE SAME, and NELSON *against* COCKE.

An attachment having been served to compel performance of a decree in Chancery, which was erroneous, in consequence of a mistake of the Chancellor, and was also improperly obtained against one of the defendants, on whom no process had been served; and the said defendant having been induced, under influence, of the decree and *duress* of the attachment, without knowing of his rights, to pay a sum of money and execute an obligation for a farther payment; on a bill of review, the money was correctly decreed to be refunded, and the obligation to be surrendered.

Where, by mistake, the vendor of a

These three causes were heard together, being appeals from decrees of the late Judge of the Superiour Court of Chancery for the Richmond District.

The first suit was brought by *Suddarth* against *Robert Nelson* for the purpose of reviewing a decree obtained in a former suit brought by the said *Nelson* against a certain *John Syme*, *Mildred Syme*, and *Suddoth;* of recovering back a sum of money paid by him the said *Suddarth*, under influence of that decree; of obtaining a discharge from an obligation given by him in consequence of the award of certain arbitrators, to whose opinion he had submitted the value of so much of an estate in land, (to which the said *Nelson* claimed title, under the said decree,) as was in his the said *Suddarth's* possession; and of setting aside so much of that decree as would have compelled him to surrender the said land to the complainant, if the matter in controversy had not been submitted to arbitration.

The second suit was brought by *Nelson* against *Suddarth* for a specifick performance of the award.

The original decree, and all the consequences flowing from it, were founded on a mistaken idea of the Chancellor, that *John Syme* the elder was tenant by curtesy of certain lands which were entered and surveyed by his wife's father.

The circumstances were these.—*John Syme* the elder intermarried with *Mildred Meriwether*, an infant daughter of *Nicholas Meriwether* deceased, and his sole heiress. The said *Nicholas Meriwether* had made an entry for 1600 acres of land in the then county of *Goochland*, now *Albemarle;* but he dying in the year 1741, before a patent had issued, and his widow having married *Dr. Thomas Walker*, that gentleman obtained it on the 28th of August 1746, in the name of his step-daughter *Mildred Meriwether*. After her marriage, and while she was yet under age, the said *Syme* (her husband) sold the said land to *William Nelson* father of the appellant. She died in 1754, leaving three children, of whom *John Syme* the younger was the eldest and her heir.

The conveyance from *John Syme* the elder to *William Nelson* bears date the 26th of April 1755.

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NELSON *against* SUDDARTH, THE SAME *against* THE SAME, and NELSON *against* COCKE.

The patent to *Mildred Meriwether* and conveyance from *John Syme* to *William Nelson* describe the land as 1600 acres, by certain metes and bounds; but *Nelson* settled his plantation not within those limits.

Nicholas Meriwether had made another entry for 400 acres of land, which were surveyed, on the 28th of March 1740, adjoining the said tract of 1600 acres, and including the plantation settled by *William Nelson*. This entry had escaped the notice of *Dr. Walker;* but *John Syme* the younger, having attained his full age, made the discovery; and, after the establishment of the commonwealth's land-office, had those 400 acres resurveyed, for the purpose of ascertaining their identity; and was proceeding to obtain a patent on the original survey, when he was restrained by a caveat entered at the instance of *Robert Nelson* the appellant.

William Nelson the elder being then dead, and having devised the 1600 acres of land to the appellant, he had obtained from the said *John Syme* the younger, a deed of confirmation which neither abridged nor extended the boundaries of the original tract. *William Nelson* the younger, (brother of the appellant) made an entry for the same 400 acres of land, had them surveyed, and sued out a caveat to prevent the emanation of a grant to the appellant; after which the appellant dismissed his caveat against *John Syme* Jr., and a patent issued on the 31st of July 1788 to *William Nelson*, who thereupon conveyed the land to the appellant. *John Syme* Jr., as soon as he was informed of the dismission of the appellant's caveat, proceeded to obtain a patent, which bears date the 20th of June 1791, for the same 400 acres of land, on the ancient survey of his grandfather *Nicholas Meriwether;* stating his descent and deriving his title through his mother; but soon afterwards sold the land to *Suddarth*, and put him in possession.— After this sale and delivery of possession, *Suddarth* hearing of the claim of *Nelson*, refused to pay the purchase money; whereupon *John Syme* Jr. brought a suit in the late High Court of Chancery against *Robert* and *William Nelsons*, stating his title to the said 400 acres of land; his sale therof to *Suddarth;* and the manner in which the defendant *William Nelson* had obtained a patent for the same, and conveyed it to *Robert Nelson;* which he charged to have been by fraud and collusion between the two brothers. He therefore prayed that the patent to *William Nelson* should be set aside and the land decreed to him; and that the defendant should account for the rents and

tract of land delivers to the vendee possession of other land which does not belong to him, and the vendee is evicted from such other land; he is not to be compelled to pay rent to the vendor for the time he remained in possession thereof; although he continues to hold the full quantity which he bought by certain metes and bounds.

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NELSON *against* SUDDARTH, THE SAME *against* THE SAME, and NELSON *against* COCKE.

profits during the time that they and their father had held possession.

The answer of *Robert Nelson*, stated that his father had purchased of the complainant's father, and devised to him the defendant, who, long afterwards, discovered that 400 acres (possession of which had been delivered by the agent and guardian of the complainant's mother, thirty years before) were surveyed for the complainant; and, thereupon, he, the defendant, had caveated the same and taken measures to obtain a patent therefor:—that, if the Court should be against him on this point, his title was still good, during the life of the complainant's father *John Syme* the elder, who had paid a valuable consideration to the complainant to induce him to confirm his sales.

The depositions taken in the cause proved that *Dr. Walker*, who was *supposed* to be the agent of *John Syme* the elder, showed the lands to the agent of *William Nelson* the elder: but *Dr. Walker* declared that he showed them as the *friend* and not as the *agent* of *Syme*, and that he did not know the situation of the tract in dispute, till he heard it was caveated. *John Syme* the elder deposed that he sold the land to *William Nelson* the elder as described in the deed, and no other.—Another witness stated only that *Dr. Walker* and himself showed the land; and that, if there had been any entry in favour of *Syme*, he thought he would have known it.

John Syme Jr. having died intestate, the suit (which abated by his death) was revived on the day of March 1793, by consent, in the names of *John Syme* his son, and *Mildred Syme* his daughter, by *Nicholas Syme* their next friend.

On the 18th of March 1797, *Robert Nelson* brought his suit against the last mentioned *John Syme*, his sister *Mildred*, and —— *Suddoth*.

The bill stated that *John Syme* the elder being seized in right of his wife sold the land in question to the complainant's father, who devised, it to the complainant; but it was discovered in 1787, that 400 acres of it had not been patented;—that, in consequence of this discovery, *John Syme* Jr. entered for those 400 acres; but the complainant caveated; and *William Nelson* the younger obtained a patent for, and conveyed, the same to the complainant; that *John Syme* the younger afterwards obtained a patent, and brought suit against the complainant for the same land, although the complainant ought to be considered as a purchaser of the fee simple; but, if that were not the case,

at least for the life of *John Syme* the elder: that *John Syme* Jr. had sold to *Suddoth*, who refused to pay the complainant the value of the land, although when he bought of *John Syme* Jr. he had notice of the complainant's right.

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The prayer of the bill was therefore that *Suddoth* should be compelled to deliver possession of the 400 acres to the complainant, and that the defendants should account for the rents and profits from the time when *John Syme* Jr. obtained possession.

The answer of the defendants *John* and *Mildred Syme* insisted that the 400 acres of land were not comprehended in the deed from *John Syme* the elder to *William Nelson* the elder.

The exhibits filed in this cause were the patent to *Mildred Meriwether* for 1600 acres of land; a deed of release from *Robert Nelson* the complainant to *John Syme* Jr. for a tract of land which was mortgaged to *William Nelson* the elder by *John Syme* the elder as an indemnity against his wife's title; the patent to *William Nelson* the younger, which was for 481 acres of land; the patent to *John Syme* Jr. for 400 acres; and the deed from *John Syme* the elder to *William Nelson* the elder.

These two causes came on to be heard together, and the Chancellor decreed that the patent to *William Nelson* the younger should be vacated, as having been obtained by fraud; but that *John Syme* the elder being tenant by the *curtesy* his sale and conveyance to *William Nelson* the elder passed an estate, at least for the life of the said *John Syme* the elder; (which interest he had a right to sell;) and that *Robert Nelson*, as devisee of his father *William Nelson* the elder was entitled to hold the land for that time; that after the death of the said *John Syme* the elder, it was to be delivered up to *John Syme* the younger; but, until that event should happen, *John Syme* the younger should deliver possession to *Robert Nelson*, and account to him for the rents and profits, from the time when he had taken possession, until he should so deliver it up.

In the above decree the sale from *John Syme* Jr. to *Suddarth* was not mentioned, nor did the name of *Suddarth* occur in it: yet an attachment was issued against and levied upon him, to compel him to surrender the land, and to pay the intervening profits thereof between the time, when the occupation by *John Syme* Jr. commenced, and the date of the decree. This was the first legal notice of the suit which *Suddarth* had, except a service of the decree upon him. He was taken into custody, on the at-

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tachment, by the Sheriff, on whose advice he agreed to pay a certain sum of money to *Robert Nelson* for the intervening profits of the land; and, moreover, engaged to pay whatever should be considered, by men chosen for the purpose, the value of the estate by the curtesy of *John Syme* the elder. The former of these sums was paid before *Suddarth* had better advice.

Suddarth then filed the bill of review first above mentioned, making *Robert Nelson*, *John Syme*, (an infant,) by *Nicholas Syme* his guardian, *William Cochran* and *Mildred* his wife (which *John Syme* and *Mildred* were children and co-heirs of *John Syme* Jr. aforesaid) and *Elisha White* Sheriff of *Hanover*, to whose management the personal estate of *John Syme* Jr. had been committed, parties defendants.

The answer of the defendant *John Syme*, admitted the sale to the complainant, but not that all the purchase money had been paid: that of *Cochran* and wife referred to that of *Syme:* that of *White* the Sheriff merely stated that he had no property of the estate of *John Syme*, Jun.

Robert Nelson in his answer stated that the blank for the complainant's christian name, in the former suit, was left through want of information, and not from design; and that his surname was mistaken through ignorance: that the complainant knew of the suit, and, while it was depending, was served with a notice not to pay any money to *John Syme*, Jun. He pleaded the decree on which the attachment issued, and stated that the complainant thereupon purchased his, the defendant's, interest in the land with which bargain he appeared well pleased.

The cause was heard on the bill and answers, and the following exhibits; viz: *Nelson's* receipt to *Suddarth;* the award of the arbitrators concerning the back rents; *Nelson's* notice to *Suddarth;* the obligation of the latter to secure the payment of those rents; and transcripts of the records in the two suits abovementioned.

The Chancellor admitted his decree to have been erroneous, because *Robert Nelson* had no title to the land; declared that *Suddarth* was never bound thereby, because he was no party to the suit; and that the attachment against him (which occasioned the compromise with the appellant,) had emanated improvidently; and therefore directed that *Robert Nelson* should repay to the complainant the money he had received, (£ 170) with interest from the date of the receipt; should release the obligation for rent, and pay the costs to which the complainant was subjected by

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the atachment, as well as the costs of the present suit. *Suddarth* thereupon dismissed the bill as to the other defendants. From this decree *Nelson* appealed to this Court.

The second appeal was from a decree rendered in a suit brought by *Nelson* before that just mentioned, for the purpose of enforcing the compromise above stated. The answer of *Suddarth* was filed after he had exhibited the bill in the suit brought by him against *Nelson* and others. That bill is made a part of his answer in this suit, which answer confesses the compromise, but prays that it may be set aside, because obtained from him by *duress*, and without an adequate knowledge on his part, either of his own rights, or of those of the said *Nelson*. The Chancellor dismissed the bill, and *Nelson* in like manner appealed.

The third appeal was from a decree, dismissing the bill of the appellant, in a suit brought by him against *James P. Cocke*. The cause was set for hearing upon the bill and answer, without a replication. *Nelson* filed his bill alleging that he had sold to *Cocke* the tract of *patented* land, containing 1600 acres, and had delivered to him, by mistake, 400 acres, (for which there was only an *entry*,) as part of the patented land: that *John Syme* the younger was entitled to the *entry*, after the death of his father *John Syme* the elder, from whom the title to the *patented* land was deduced to *Nelson;* but that *Nelson* was entitled to possession of the *entry*, during the life of *John Syme* the elder; that *Cocke* had occupied this *entry* for several years, and therefore rent was demanded from him.

The answer of *Cocke* stated that the *entry* was a part of the *South Garden* tract which *Nelson* sold to him; that on this *entry* were all the houses of the plantation, and the first clearings on it, that *Cocke* had believed the *entry* belonged to him, as possession thereof had been delivered by *Nelson;* and that he never could have occupied it, but for such delivery; that, upon the discovery of an adverse title to the 400 acres, *Nelson* insisted that they should be considered as part of the land which *Cocke* had bought; and, upon a reference to arbitrators, it was decided, that *Cocke* should allot to *Nelson* other four hundred acres, part of the patented land, when *Nelson* should be able to make a title to the *entry;* but, if *Nelson* should never be able to make such title, that *Cocke* should retain the whole of the patented land in lieu thereof: that *Nelson* was not

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able to make a title of the *entry*, and *Cocke* assigned to him all the rents which were due from tenants, which *Nelson* accepted. The affidavits of two witnesses showed only the amount of rents which had been received. The cause having been referred to a commissioner, he charged *Cocke* with the rents, and interest on the rents; both of which charges were specially excepted to.

The Chancellor dismissed the bill; whereupon *Nelson* again appealed.

Call, for the appellant, contended that the patent of *William Nelson* the younger, being prior in date to that of *John Syme* the younger, should be preferred; and therefore that *Robert Nelson's* title under it was unexceptionable: that *Nelson's* title being superiour to that of *Suddarth*, the latter was bound by the compromise founded on the decree against him, in the suit brought by *Robert Nelson;* although a blank had been left for his christian name: and, consequently, that his subsequent purchase and agreement to pay the rent were obligatory on him.

As to the case of *Cocke*, he said, that all parties understood that the 1600 acres of land passed by the deed from *Nelson ;* but, the 400 acres having been delivered by mistake, and occupied so many years by *Cocke*, it was but right that he should pay rent for the use of them.

Warden for *Suddarth*, (after stating the case) observed, that in the suit which gave rise to that brought by *Suddarth* against *Nelson* and others, *Suddarth* had been condemned in a decree, without being heard. No process was ever served upon him; nor did he ever hear of the suit till he heard of the decree. Being in the custody of the sheriff on the attachment, he had no alternative, as he supposed, but to go to prison, or submit to such terms as *Nelson* thought proper to prescribe. Under false impressions, both as to his own situation, and the title of *Nelson*, he made the bargain with him, which the chancellor had very properly set aside. In the former suit, there was a blank for the name of baptism, and the surname was mis-spelt. An entire *misnomer* is errour, both in law, and equity.

As to the principal point, he need only say, that *John Syme* the elder having never reduced the 400 acres of land into possession during the coverture, and *John Syme* the younger having obtained a grant under the entry, which

had been made in favour of his mother, his father *John Syme* the elder, was not entitled to curtesy. The Chancellor's first decree was therefore erroneous, which went to charge *Suddarth*, in consequence of the estate, by the curtesy of *John Syme* the elder; but the last decree was correct in saying that the money which had been paid by *Suddarth*, under the influence of that decree, should be repaid, and that he should be released from all his obligations to *Nelson* in consequence thereof.

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As to the compromise, *Suddarth* was under *duress*, in the possession of the Sheriff, whose advise he followed when it was entered into. This is the very definition of *duress;* and, as nothing is valid which the party does under such circumstances, the Chancellor's other decree dismissing the bill of the appellant, filed to enforce that compromise, was also correct.

Call, in reply. With respect to the main point in this cause, whether *Nelson's* patent takes precedence of that obtained by *John Syme* the younger, the law is clearly with us. *Meriwether's* survey, on which the patent of *John Syme* the younger was founded, was made in 1740. *Nelson* and those under whom he claims were in possession from 1755. This case is precisely within the principle of *Johnson v. Buffington* (*a*) and *Curry v. Burns*. (*b*) In the latter case, it is expressly said that an entry not pursued for eleven years is void. In the present case more than eleven years had elapsed; and *Nelson* was put in possession, under a supposed right from *Syme* himself. If *Syme*, having an old entry, did not choose to carry it into a grant, in due time, can he say that *Nelson* has been guilty of a fraud in attempting to get a grant, when the land had been so long in the possession of *William Nelson* the elder, as for a descent to have been cast on his heir?

(*a*) 2 *Wash.* 116.

(*b*) 2 *Wash.* 121.

Warden. In 1746 or 1747, *Nicholas Meriwether* died: his daughter *Mrs. Syme* died while under coverture and in infancy, leaving her son *John Syme* the younger an infant only three years old. Besides, the war intervened, which put a stop to the issuing of patents till the establishment of the Commonwealth's Land-Office. *John Syme* the younger was born in 1752; in 1773, he was of age, and the King never issued any grant after May, 1774. In 1779, the Commonwealth's Land-Office was established. Taking into view the coverture of *Mrs. Syme*, the infancy of her son *John Syme* the younger, and the extension of the time

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granted by the Legislature for obtaining patents on surveys of land, *John Syme* the younger was not barred, by any limitation, from suing out a grant at the time when it issued. He referred to the case of *Picket v. Dowdall*, (c) to show that a younger patent founded on an older survey takes place of an older patent founded on a younger survey.

(c) 2 *Wash.* 106.

Call. The case of *Curry v. Burns* is decisive on this case. The register of the Land-Office was not authorised to issue a grant to *John Syme* the younger, he having abandoned his entry and survey. *Syme* should have caveated *Nelson;* and the whole question would have been whether an old entry and survey, which had been abandoned, could have been set up against an entry and survey which had been regularly made and pursued with due diligence.

The case of *Nelson v. Cocke* was submitted without farther argument, on the part of the appellant. *Mr. Call* considered it as depending on the main point in the case of *Nelson v. Suddarth.*

Randolph and Warden for *Cocke*, contended that the cases were different. The bill demands nothing more than the curtesy of *John Syme* the elder. The suit was brought to recover rent from *Cocke* for the time he cultivated the land; on a supposition that *Nelson* was entitled to the curtesy of *Syme*. *Cocke* improved the 400 acres of land: *Nelson* thought he had sold them: *Cocke* thought he had bought them: the mistake of *Nelson* led *Cocke* into a mistake. It was an imposition upon *Cocke* for which *Nelson* is not entitled to relief. At the time the Court awarded to *Robert Nelson* the land of *John Syme* the elder, an account was directed in this case. The Master reported £ 96 to be due from *Cocke* for rent. He excepted to the report upon two grounds. 1st, that affidavits had been read which were taken without notice; 2ndly, that *interest* had been allowed on £ 84, part of the rent; which allowance was contrary to the decisions of this Court. The Chancellor in his subsequent decree says the former decree was erroneous, so far as it went to say that *Nelson* was entitled to the curtesy of *John Syme* the elder. It has been said, in the argument of *Nelson v. Suddarth*, that *John Syme* the elder was not entitled to curtesy, because he was not seized during the life of his wife. *Nelson* was

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never entitled to any estate in fee in this land; and his title was founded entirely on the erroneous decree of the Chancellor. On the special circumstances of this case, *Nelson* is not entitled to recover. He was in possession of 2000 acres of land, and sold 1600 acres to *Cocke*. Upon delivery, he gave *Cocke* possession of 400 acres to which he was not entitled.

Can he then compel *Cocke*, who only contemplated a purchase of 1600 acres, to pay rent for what by his own mistake, and not the fault of *Cocke*, was erroneously put into his possession?

Curia advisare vult.

Friday, July 3rd. The decrees in all three of the suits were unanimously AFFIRMED, by the whole Court, consisting of all the Judges.

JUDGE FLEMING delivered the following opinion.

From an attentive examination of the records in these suits, it appears to me that neither the appellant, nor either of those under whom he claims, had ever any *equitable* title to the 400 acres of land in question; nor a *legal* one, until, by a piece of artful management, not much to his credit, he got a friend to obtain a patent for it, in the year 1788, during the pendency of his *caveat* against the rightful owner, which he, in his answer to *Syme's* bill, says, "was afterwards dismissed, because there was found to be considerable difficulty in bringing it to trial." But, as I conceive, because, pending the *caveat*, his friend had obtained a patent for the land, which was conveyed to him.

Let us examine his equitable title, which he conceives to be indubitable. His father, under whose will he claims, in the year 1755, purchased 3500 acres of patented land contained in two grants; the one for 1900 acres, lying in the *North-Garden*, and the other for 1600 acres, lying in the *South Garden*, and adjoining the land in controversy. This land was purchased of the late *Colonel John Syme*, who had therein only a life estate, in right of his wife, then an infant, not more than 15 or 16 years of age; and who, for the sum of £800, sold the land to the late *Mr. William Nelson* (father of the appellant,) and give a mortgage of another estate to the purchaser, to secure the title at future day; and thus defeated the inheritance of his own offspring.

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Possession of the land, so purchased, was immediately given to *Mr. Nelson*, who, supposing the land in question (for which there was an entry and survey in the name of *Mildred Meriwether*, then the infant wife of *Colonel Syme*,) to have been included in his purchase, actually settled his people thereon—neither he nor *Colonel Syme* having any knowledge that such an entry and survey, (which were made in the year 1740,) ever existed. And this mistake of *Mr. Nelson*, or his agent, in settling land, which of right belonged to another, (owing entirely to their own inattention and negligence, as the boundaries of the purchased lands are minutely described in the patents,) was to give the appellant an equitable title against the infant presumptive heir of an infant *feme covert;* which heir had already been defeated of his inheritance of 3500 out of thirty nine hundred acres of land! Of what, it may be asked, has the appellant to complain? His father, under whom he claims, purchased, and supposed he had purchased, 3500 acres of land, *only*, of which he was put into immediate possession, and the title secured; and there is not even a suggestion that there is a deficiency in quantity.

The *reasoning* of the appellant on the subject seems to amount to this—"I have purchased, and paid for your "coat, and have (through mistake, and without your "knowledge,) almost worn out your cloak; and am therefore entitled to that also."

Let us now take a short chronological view of the title of *John Syme*, the son, who was father of the appellees, *John Syme* and *Mildred Syme*, (now *Mildred Cochran*) and heir of *Mildred Meriwether*, who died the wife of *John Syme* the elder, about the time she came of age; in whose name, and for whose benefit, the entry for 400 acres of land (now the subject of controversy,) was surveyed the 22nd of March, 1740. But neither of the parties had any knowledge of such entry and survey until many years after *John Syme*, the son and heir, came of age; soon after which, he, by indenture, bearing date the 1st of September, 1777, confirmed to the appellant a complete title to the lands purchased by his father of *John Syme* the elder, and thereby obtained a release of the estate mortgaged by the latter, to secure that title.

Some time in the year 1787, *John Syme*, the son and heir, found among the papers of his grandfather *Nicholas Meriwether*, the entry and survey beforementioned, which was the first discovery he ever made of them; and, on the 8th of October, the same year, he returned them to

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the Register's Office, in order to obtain a patent thereon. A warrant was laid on the land, and a survey thereof made, in the name of *William Nelson*, the 23d of November; which was returned to the Land-Office the 18th of December following; and, on the 4th of April 1788, the appellant entered a *caveat* against the patent of *Syme*, which he says, in his answer, "was really to contest the right between them"—and, had that been truly the case, there would have been nothing blameable in his conduct: but we have already seen, that, pending the *caveat*, his friend obtained a patent from the survey of November, 1787, and, soon after, made him a conveyance of the land. How long it was afterwards before the *caveat* was dismissed does not appear; but *Syme* did not obtain his patent, until the 20th of June, 1791.

I shall make no comments on these transactions, farther than to observe, that it is clearly my opinion that *Syme's* equitable title is paramount to, and ought to supersede the legal title of the appellant, thus surreptitiously obtained; also, I conceive, never had even the shadow of equity in his favour; and he may think himself fortunate, that he has not been compelled to account for the rents and profits whilst the land was in his occupation.

The case of *Picket v. Dowdall*, (2 Wash. 106.) was cited in the argument, by the appellant's counsel; but the circumstances in that case were so widely different from this, that it seems unnecessary to take further notice of it.

And upon the whole, I concur in the opinion, that all three of the decreess ought to be affirmed.

ROE *against* CRUTCHFIELD,

Wednesday, 24th June.

If there be several counts in a declaration, and any one of them good, though all the rest be faulty, a general demurrer to the declaration is bad.

This was an action brought by *Crutchfield* against *Roe*, in the County Court of *Spotsylvania*.

The declaration contained two counts:—the first charged the defendant as the remote assigner of a bond which had been prosecuted to a judgment against the obligor, an execution issued on the judgment and a return of "no effects" thereon by the sheriff; in which count there is a profert of the record and proceedings in the suit against the obligor: the second count was for money had and received.

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The record then states, that the defendant took an imparlance, and at the Court when the cause is stated to have been tried, "until which day the same was from "time to time continued," it is stated, "the parties came "by their attornies, and the defendant by his attorney *de-* "*murs* to the plaintiff's declaration, and the plaintiff by "his attorney joins in the said demurrer, and thereupon "the defendant's demurrer to the plaintiff's declaration "being argued and overruled, it was ordered that a writ "of inquiry of damages be executed." Whereupon came a jury, &c. who found a verdict for the plaintiff for $357, 80 cents; and judgment was rendered for the same with costs. The defendant appealed to the District Court of *Fredericksburg*, and the judgment having been there affirmed, took a second appeal to this Court.

claration ought to be overruled, and judgment entered for the plaintiff provided the counts can be properly joined in the same action.

Williams, for the appellant. The grounds upon which I expect the judgment must be reversed are these: 1st, that the County Court ought to have sustained the demurrer as to the first count, even if the second count had been good and a judgment could have been given upon it; and the writ of inquiry should have been awarded only as to that count: 2dly, that it being on a demurrer, and one count faulty, judgment ought to have been given for the defendant.

In such case, if a writ of inquiry be executed, afteroverruling the demurrer *it seems* the defendant may, nevertheless, object to the admission of evidence applying only to the faulty counts, and tender a bill of exceptions or demurrer to the evidence; or may apply to the Court to instruct the jury to disregard such faulty counts. But, if no such step be taken, and entire damages be given, the verdict is good, and judgment ought not to be arrested.

There can be no question but that the first count was bad, because an action could not be maintained against a remote assigner of a bond.* This point has been fully settled by this Court. The rule at common law, is, that if there be two or more counts in a declaraton and one be faulty, judgment for the whole shall be arrested. (*a*) In this case the Court overruled the demurrer as to both counts, and gave judgment upon the entire declaration.

If the defendant had been before the jury upon a plea, he might have moved the Court to strike out the count which was faulty; but damage having been assessed upon a writ of inquiry he was to be regarded as not in Court.

If these positions be correct, it follows, as a necessary consequence, that the judgment must be reversed; for a judgment (being an entire thing) must be affirmed *in toto*, or reversed; it cannot be affirmed in part and reversed in part.

* Note. See the Acts of 1806, ch. 28, sect. 3, where the law on this subject is altered.

(*a*) 2 Ld. *Raym.* 825, *Williams* v. *Cutting*.—5 *Bac. Abr. Gwil. edit.* 329, 330.

Randolph, for the appellee, said that he did not mean to impugn the doctrine that an action could not be sustained against a remote indorser; but it was unnecessary to consider that point, in deciding upon the present case. He contended, however, that there was a sufficient consideration to support the *express assumpsit* laid in the first count. The appellant, though not immediately, was ultimately liable as indorser: for, if all the intermediate indorsers were insolvent, equity, which abhors circuity of action, would give a decree against him in the first instance. Wherever the consideration is legal, equitable or moral, it is sufficient to found an assumpsit. If a person shall be satisfied that he will be ultimately compelled to pay a sum of money, will not his *express promise* bind him both in law and equity?

But it is really unimportant whether the first count be considered good or bad: for the law, upon the whole case, is directly opposite to what is contended for by *Mr. Williams*.

The most valuable book lately published, *Saunders's* Reports edited by *Williams* expressly lays it down, "that "if there are several counts in the same declaration, some "good and some bad; and the defendant demurs generally "to the whole declaration, the plaintiff shall have judg- "ment for so much as is good."(*b*) This is the general law now practised upon both in England and this country.(*c*)

Judge TUCKER asked *Mr. Randolph* whether he had examined the case of *the Duke of Bedford v. Allcocke* (*d*) and the opinion of LEE Chief Justice delivered in that case. (*e*)

Randolph. After such a respectable authority as *Saunders*, edited by *Williams*, I deemed it unnecessary to look into any others.

It is said by *Mr. Williams*, that the defendant had no opportunity to except to the bad count, because the jury were sworn on a writ of inquiry. I do not admit that either count was bad. But it may be asked, why was the defendant in this situation? he throws away the right of defence by his pleading, and then very modestly, asks the Court to reverse the judgment, merely because he had not availed himself of every advantage which he might have resorted to if he had sought it in time. If we required the aid of the statute of *Jeofails* it would be abundantly sufficient. (*f*) But the case is clearly with the appellee on common law principles.

(*b*) 1 *Saunders* 286, note (9), *Duppa v. Mayo*, 2 *Saunders* 380, note (14), *Pinckney v. Inhabitants of East Hundred*.

(*c*) 5 *Bac. Abr. Gwil. edit.* 349, 461. 5 *Com. Dig.* 485. 1 *Bos.* and *Pull. New Rep.* 43, *Judin v. Samuel*.

(*d*) 1 *Wilson* 248.

(*e*) *Ibid.* 253.

(*f*) See Rev. Code, Vol. 1, ch. 76, sect. 38, pa. 112.

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Williams, in reply. The rule of law is admitted by *Mr. Randolph* that an action will not lie against a remote indorser, but he says there was a sufficient consideration to support the *express assumpsit* charged in the declaration. If he had looked into the declaration he would have found that there was only an *implied assumpsit*. The consideration must be good and valuable in law to support even an express assumpsit. But the rule of law, in cases of this kind, is, that the party is bound as indorser, merely on account of the privity between him and the next immediate indorsee. The supposed liability of the appellant as indorser, in this form of action, from its analogy to proceedings in equity will not hold. If a bill in equity had been brought, it might have appeared that *Roe* had received no consideration from the person to whom he indorsed, and, therefore, he would not have been liable in equity.

If the County Court had given judgment for the demurrant on the first count, their decision would have been correct; and the defendant might then have moved the Court to reject the evidence as inapplicable to the second count. But the judgment of the Court was that the whole declaration was good. This was clearly an erroneous opinion.

The rule from *Saunders* is confined to those cases where there are different breaches assigned in an action of covenant: in such cases the Court will give damages so far as the declaration is good, and the breaches are well assigned.

The Act of *Jeofails* referred to by *Mr. Randolph* only applies to cases where the parties are at issue before the jury, and not to judgments by default, or on inquiry of damages after a demurrer overruled.

The case from *Wilson* does not apply to the circumstances of this case. All the other cases go to say, that judgment shall be given for the demurrant as to the bad count. But here the Court gave judgment that both counts were good, and executed a writ of inquiry as to the whole.

Monday June 29th the Judges delivered their opinions.

Judge TUCKER. *Crutchfield* brought an action on the case aganist *Roe* on a sealed note, assigned by *Welch* to *Roe*, by him to *Lee* and by *Lee* to *Crutchfield*, and declared upon it accordingly; and added a second count for money had and received to the plaintiff's use. The de-

fendant demurred generally to the declaration and the plaintiff joined in demurrer: the Court gave judgment for the plaintiff on the demurrer, and awarded a writ of inquiry, which was executed, and damages accordingly. No bill of exceptions or demurrer to evidence, nor motion to instruct the jury to disregard the first count as faulty, (see V. L. 1794, c, 76. s. 38) appears to have been made when the writ of inquiry was executed.

There are two questions in this case. First, whether the Court decided properly upon the demurrer. As a defendant may demur to one count in a declaration, and plead to another, because separate counts are regarded as several declarations (4 Bac. Abr. 130, old edit.) So where there are two counts, one of which is confessedly good, if, instead of pleading to it, and demurring to the other, as he might, he prefers to question the goodness of both, by a general demurrer, he ought not to invalidate that which is *good* because the other may happen to be bad. On the contrary having unnecessarily demurred to that which is good, he ought to have judgment against him, as to *that;* provided both counts can properly be joined in the same action, as there can be no doubt the two counts in this declaration may. And so it was expressly decided in *the Duke of Bedford v. Allcocke*—(1 Wilson, 252, 253,) in which case there were three counts, two of which were objected to as faulty, by a general demurrer. But the Court said they might all three be joined, and one of them was good, and therefore they gave judgment for the plaintiff, "*non constat* but that upon a trial the plaintiff "might be able to prove *that* count, and might take a "verdict for the same, though the other counts *should be* "*bad*, and therefore they gave no opinion as to those "counts," this case is so far perfectly like the case before us.

The second point is, whether, if one of these counts be bad, the defendant can now avail himself of it. If upon the trial he had tendered a bill of exceptions, whereby it had appeared, that no evidence, whatsoever was given upon the second count, except such as might have been sufficient to maintain the first count, if good, or if he had demurred to the evidence, and thereby shown the same thing in effect; or if (as I am inclined to think he might) notwithstanding the judgment on the demurrer, he had applied to the Court to instruct the Jury to disregard the count, which he supposed to be faulty, so as to shut out the evidence upon that count; in either of these cases, he might, if the damages were assessed generally, have avai-

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led himself of the errour in the first count, as was done in the case of *Hooe v. Wilson*, where it appeared by the bill of exceptions that the same evidence was produced in support of both counts, to the first only of which the evidence applied, and therefore there was no separate evidence to the second count. But the defendant having neglected to take any of these steps upon the execution of the writ of inquiry, we may say in the words of the Court of K. B. *non constat*, but that the plaintiff *did* prove the count for money had and received, by other evidence than that which he offered to prove the first count. And, since that is the case, the Act of Jeofails, L. V. 1794, c. 76, s. 38, does, in my opinion, make the verdict good. I am therefore for affirming the judgment.

Judge ROANE. In the case of *Grant v. Astle* (Doug. 730.) the Court of King's Bench, while they admitted it to be a settled rule, that where there are general counts, and entire damages are given, and one count is bad, and the others not, this shall be fatal; lamented that so inconvenient and unfounded a rule should ever have been established: and *that*, upon the fictitious reasoning, that the jury has assessed damages on *all*, though in truth they never thought of different counts; that what makes the rule appear more absurd, is, that it does not hold in criminal prosecutions; and that in civil cases the Court has gone as far as it can, (the rule being settled,) by allowing verdicts in such cases to be amended by the Judges' notes. This decision took place in that country in 1781, and being followed up by similar decisions here, produced the provision on this subject in our Act of Jeofails. That Act should certainly receive a liberal construction in order to get rid of the absurd and inconvenient rule abovementioned. By the 27th section of the statute of Jeofails, (Rev. Code, Pleas. edit. pa. 112) on a *general* demurrer joined to the declaration, the Court must not regard any defect or imperfection therein, unless something so essential to the action as that judgment according to law and the very right of the case cannot be given, be omitted. This section applying to a declaration with a single count, part of which is faulty, certainly applies with peculiar force in favour of a declaration, which however faulty, as to one count, has another, *perfectly legal*, both in form and substance. The judgment of the County Court overruling the demurrer in the present case was therefore perfectly correct. Under our Act of Assembly, the case is clear for the appellee;

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and perhaps also under the English decisions as appears by the case in 1 *Wilson*, 252, before stated.

I am of opinion that the judgment should be affirmed.

Judge FLEMING. This appears to me a very plain case, and the law seems against the appellant on two grounds: 1st, By our Act of Assembly for limitation of actions, &c. Sect. 27; (*a*) it is declared that, "where a demurrer shall "be joined in any action, the Court shall not regard any "other defect or imperfection in the writ, return, declara- "tion, or pleading, than what shall be specially alleged "in the demurrer, as causes thereof, unless something so "*essential* to the action or defence, as that judgment, "according to law, and the very right of the cause, can- "not be given, shall be omitted."

(*a*) Rev. Code, 1 Vol. p. 112, ch. 76, sect. 27.

This being a general demurrer, nothing special being stated as a cause thereof, and there being sufficient stated in the declaration to support the action, it comes expressly within the provision of the act.

2nd. If we recur to the English Law, it is there decided, in the case of *the Duke of Bedford v. Allcocke*, (1st Wilson, 252.) that if one count in a declaration be good, though all the rest be bad, there shall be judgment for the plaintiff upon a general demurrer to the whole.

I therefore concur in the opinion that the judgment ought to be affirmed.

Judge LYONS.—On a *general demurrer* the party may avail himself of every advantage which he might take on a motion in arrest of judgment, and no other. If there be defects in the process or pleadings they should be noticed by a *special demurrer;* as the Court cannot regard any defects of that kind, after demurrer joined in any action, other than what shall be specially alleged as cause of demurrer, unless something shall have been omitted so essential to the action or defence, as that judgment according to law and the very right of the case cannot be given. (See Rev. Code, Chap. 76, Sect. 27, pa. 112.)

"Where there are several counts, one of which is faul- "ty, and entire damages are given, the verdict shall be "good; but the defendant may apply to the Court to in- "struct the jury to disregard such faulty count." (Ibid. Sect. 38.) This law was made to prevent motions in arrest of judgment; and the defendant should have taken advantage of the defect in the way authorized by it; but, not having done so, he is bound by the verdict and judg-

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ment, which is not now to be arrested. The case before us is expressly within the principle of our law, and the case of the *Duke of Bedford v. Allcocke* (1 Wilson, 252.) which was cited by the Judge, who first delivered his opinion.

I therefore concur in the opinion expressed by all the other Judges, that the judgment be affirmed.

Thursday, 25th June.

MILLER *against* BEVERLY, widow, &c.

A Writ of dower *unde nihil habet* cannot be maintained against a tenant for years only, but ought to be brought against a tenant of the freehold, having the inheritance, or an estate equal in duration to the life of the demandant.

This was an appeal from the judgment of the District Court of *Fredericksburg*, affirming a judgment of the County Court of Caroline.

The case was this: *Robert Gaines Beverly*, husband of the appellee, being in his lifetime possessed of a large real estate, made a settlement on his wife of greater value than her dower in all his lands, and died leaving her his widow and several children, who were alive at the date of the case agreed in this cause. He also leased a tract of 700 acres of land, lying in the county of Caroline, to the appellant, for a term of ten years, reserving rent, &c. which term was unexpired at the time of the trial of the cause in the County Court. His widow, the appellee, sued out her summons and filed her count, *in dower unde nihil habet*, against the appellant, for dower in the said 700 acres of land. A conditional judgment was confirmed against him, by default, and a jury directed to be empannelled, at a subsequent term, to inquire whether he had more right to hold the said land than she had to demand dower in the same. Instead of a special verdict a case was agreed between the parties, to the following purport:—"That *Robert Beverly* was seised and possessed of the land in the "count mentioned while he was the husband of the demandant; that he leased the same to the defendant for "the term of ten years then unexpired; that since the decease of the said *Robert Beverly*, the demandant had "received rent from the defendant for the said land; that "no Court had appointed any guardian to the children of "the lessor of the defendant; and that, by virtue of a settlement made by the said lessor, in his lifetime, on the "demandant, she had received in lands, more than the "value of her dower."

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The County Court gave judgment for the dower demanded; from which an appeal was taken to the District Court of *Fredericksburg;* and the judgment having been there affirmed, an appeal was prayed to this Court.

Warden, for the appellant, took several exceptions to the proceedings in the cause, as well as to the judgment of the Court.

1. That the District Court ought not to have affirmed the judgment of the County Court, on a transcript of its record, which did not exhibit the original summons, whereby the correspondence or variance between it and the Court might appear; the summons not being described as a *writ of dower unde nihil habet.* If it had been described as a *writ of dower unde nihil habet*, he might not have made the objection; since no *oyer* of the summons was taken.

2. That the husband of the demandant was denominated by a different name in the count from that in the case agreed; in the first, he is called *Robert Gaines Beverly*, in the second, *Robert Beverly.*

3. That it nowhere appears in the record, that the husband, during the coverture, was seised of *such an estate as would entitle the wife to dower.* Since our law of descents, a widow cannot demand dower unless the husband had been seised of a fee. A man may be *seised* of an estate for life. The Court ought to have seen what kind of estate it was, of which dower was demanded: for, if the husband had not appeared to have been seised of an estate of inheritance, the wife was not dowable. This is a fatal errour.

4. That there ought not to have been an award of *habere facias seisinam* of dower, on a case agreed, which stated, that the demandant had received, in other lands of her husband, more than the whole of her dower, by virtue of a settlement on her, made by him, in his lifetime;—without saying any thing whereby it appears whether the said settlement was made *before*, or *after* marriage, or whether it was in bar and lieu of dower, or not. It is a known principle of law, that when there is a *jointure*, before marriage, and in lieu of *dower*, the wife cannot demand the latter. But it does not appear from the record that the jointure was made at any time other than "*in the lifetime*" of the husband. That is a very indefinite expression. His *lifetime* existed both before and after marriage.

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The finding was too vague for the Court to give any judgment upon.

5. That the writ of dower was brought against a man who had no *seisin*. It was brought against a tenant for years, when it could only lie against a tenant of the freehold or inheritance. (*a*) The tenant for years held the *possession* only, but the *seisin* was in the demandant's children. The tenant could not give *seisin* because he had it not. The writ should consequently have been brought against the children, who, by their guardian, ought to have assigned dower. But it is expressly found that she received rent of the tenant. She could not have received it as executrix or administratrix of her husband, but only as the natural guardian of her children. The reception of rent was an estoppel to her to demand dower of the tenant, because such reception amounted to a confirmation of the lease; and because, by a recovery of one third of the land, she would have taken a part of the subject out of which the rent issued.

(*a*) F. N. B. 148, a.—5 *Comyn's* Dig. 240.—*Harg. Co. Lit.* 32, a.

6. The judgment was erroneous, in being absolute in the first instance. There ought to have been an inquest as to the mesne profits from the death of the husband. On the return of the inquest the judgment would have been complete, and not before. (*b*)

(*b*) 1 *Morgan's Att. Vade Mecum*, 434.—*F. N. B.* 346, 347.

Randolph, for the appellee, said it was unnecessary to dwell on many of the points made by *Mr. Warden*. With respect to the summons, it was no part of the record, because *oyer* had not been taken of it.—As to the second point, the record furnished a sufficient answer—The parties themselves, in the case agreed, had considered the *seisin* of *Robert Gaines Beverly* sufficient to entitle his widow to dower. They had taken other ground; and did not rely on any deficiency of estate in him. He is said to have been *seised*, which expression has often been considered as implying an absolute estate. Since our Act of Assembly, a deed not mentioning *heirs*, carries a fee simple. The word *seisin* may consequently imply an estate of inheritance.

As to the fourth and fifth points, he admitted, that if a settlement be made *before marriage* and *in lieu of dower*, it was a bar; but if it were merely a common settlement or conveyance, it would be no bar. The exception that it does not appear at what time the settlement was made, or of what nature it was, ought not to come from the other side. Our right is complete: we show an indisputable

legal title:—*they only omitted to state a material objection.* They rely on the settlement, and ought to show on what it was founded. But, if the case agreed be imperfect, it may be set aside, and a *venire facias de novo* awarded. (*c*) The widow, in demanding *her seisin*, need not bring her action against a man *seised* of an estate of inheritance. She only claims her right; and the husband can do no act to deprive the wife of her dower in the specifick land itself.

(*c*) 1 Call, 212, *Brewer v. Opie.* See also *Bacon's* Abr. title "*Verdict*," as to awarding a *venire de novo*.

With respect to the inquest for the mesne profits, that was for her benefit;—She might, therefore, waive it, and take a writ of *habere facias possessionem* for her one third of the land. The children being no parties to the suit, no judgment against the tenant could affect their rights.

Warden, in reply. The first exception will be left to the Court without further observation. But, as to the second, it, being to a misnomer in the christian name, was always held to be fatal.

It is said by *Mr. Randolph*, that when a person is *seised* of an estate, it necessarily means an estate of inheritance. There is no authority or dictum in the law to warrant the assertion. Suppose there had been a plea that the husband was not seised; what would have been the issue?—that the husband was or was not seised of an estate of inheritance?—The husband might have been seised of an estate for his own life, or for the life of another, and yet the widow not entitled to dower. The Court will not go further to intend an estate, than the parties have gone themselves.

But it is said not to be necessary for the tenant to be seised of an estate of inheritance.—Can the demandant recover of the tenant seisin, when the tenant has it not himself? The possession of *Miller* was not the seisin of *Beverly:* but his possession was the seisin of *the heirs of Beverly*, of whom alone it could be recovered.

As to the widow's having received other lands. Is the finding, in this case, a complete bar? Such a settlement ought to have been found, as would defeat the claim of dower; for, if we are to presume any thing, we must presume from the nature of the circumstances, that the settlement was before marriage, and a bar to dower. It is not probable that *Robert Beverly*, after he had married and had children, (as is found in the case agreed,) would have given to his wife more than her just proportion of his estate, to the injury of his children. The case of *Axtel v.*

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Axtel, (*d*) shows that at the common law, a widow cannot claim both her jointure and dower. Without an inquest, the judgment was a mere nullity and never could be carried into effect. The sheriff could not execute it; and give dower by metes and bounds, as he ought. She ought to have moved the Court for a writ of *habere facias seisinam*, and at the same time for an inquest as to the profits.

(*d*) 2 Chan. Cases, 24.

Curia advisare vult.

Monday, June 29th. The President delivered the opinion of the Court, (consisting of all the Judges) that the judgment of the District Court was erroneous, in this, "that a suit was brought against a tenant for years only, "and not against a tenant of the freehold, having the in- "heritance, or an estate equal in duration to the life of "the demandant." Judgment of the District and County Courts reversed.

Monday, 29th June.

NICE *against* PURCELL.

A Court of equity is not bound to direct an issue, on the ground that the evidence before it is contradictory; but may judge of the weight of evidence, and if its conscience be satisfied, decide without a jury.

See the same point incidentally admitted in the case of *Rowton v. Rowton*, *Ante* p. 93.

On an appeal from a decree of the Superiour Court of Chancery for the Richmond District, pronounced in May 1802, reversing a decree of the Hustings Court of the city of Richmond.

Purcell filed a bill in the latter Court against *Nice*, stating that he had sold to him a horse for 120 dollars, and received in part payment, certain soldier's claims for military services, to the amount of $102, which *Nice* assured him he was entitled to, and that, on application at the war-office, the money would be as punctually paid as on bank notes; that, if the money was not paid from any cause whatever, *Nice* was to pay that sum on application, or return the horse; that, on application at the war-office, he found that neither he nor *Nice* himself could draw the certificates for want of proper authority from the original claimants; that *Nice* refused to comply with his engagement, and the subject in controversy having been referred to arbitrators, they made a report, but no final decision, only enjoining *Nice* to use his endeavours to procure from the original claimants, proper transfers: that *Nice* had

used no exertion to procure such transfers; that, at the time of reference, the parties placed twenty dollars each in the hands of the referees to compel a performance; but that either party might vacate the award by forfeiting the twenty dollars; that the arbitrators, not considering the award final, recommended that each party should receive back his own money, and, with that view, laid it on the table; but *Nice* took possession of the whole of it, in opposition to the opinions of the arbitrators. The bill prays for a discovery and for general relief.

The answer of *Nice* stated the contract differently from that set forth in the bill. It represented that *Purcell* proposed that he should assign the certificates to him, but he expressly refused. He admits, however, that he did tell *Purcell* he believed they would be paid; and it is possible, he did say they would be paid as promptly as bank notes; but this was founded entirely on the information he received from others; that he was not to be answerable for the certificates in any event, unless it should appear that they were forged or counterfeited, or that there was not as much money due on them as was expressed on their face; and that *Purcell*, after inquiry, was satisfied to take them on the terms proposed.

The award of the arbitrators, (which was filed among the exhibits,) appeared not to be final, but only recommendatory as stated in the bill.

The answer was supported by the deposition of one witness, and the allegations of the bill by the depositions of two; besides which, there was other conflicting testimony in the cause.

On a hearing, the Court of Hustings dismissed the bill; from which an appeal was taken to the High Court of Chancery.

The Chancellor being of opinion that the evidence supporting the bill outweighed that supporting the answer, and moreover, that the award being void, *Nice* had no right to detain the deposit of twenty dollars, placed in the hands of the arbitrators by *Purcell*, reversed the decree of the Court of Hustings, and directed that *Nice* should pay to *Purcell* the amount of the value of the certificates, together with the twenty dollars which had been deposited with the arbitrators, and taken by *Nice* as a forfeiture for not performing the award. From which decree an appeal was prayed to this Court.

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Randolph, for the appellant, contended that the deposition of a witness going to support the answer of the defendant, which expressly denied the allegations of the bill, was decisive of the question, and showed that the complainant had no ground of equity. But, even admitting the evidence to be equal, yet as it is contradictory, he submitted it to the Court, whether the Chancellor ought not to have directed an issue.

Warden, for the appellee, insisted that, as the appellant had not procured the transfers of the original claimants to the certificates, which, under the Act of Congress, could be done only by the parties themselves, the consideration on which the contract was founded had failed, and the appellee was entitled either to his property, or to money in lieu of the certificates; but that when the decree was pronounced, *money only* could be decreed by the Chancellor. He admitted the evidence was contradictory; but contended that the Chancellor had correctly determined the weight of it to be with the appellee. The Chancellor must have a conscience of his own. Doubting as to the weight of evidence, he may direct an issue; but, if his conscience be satisfied, there is no necessity; for no law requires it.

Curia advisare vult.

Wednesday, July 8th. By the Court, (consisting of all the Judges) the decree of the Chancellor, reversing that of the Court of Hustings, was unanimously AFFIRMED.

Monday, 29th June.

GARLAND *against* BUGG.

An *affidavit* filed in support of a motion for a continuance which was overruled, is not a part of the record, unless it be made so by a bill of exceptions.

This was an appeal from the judgment of the District Court of Charlottesville, rendered in April, 1807.

The appellee brought an action of detinue against the appellant, for a negro woman:—the defendant pleaded *non detinet;*—and moreover a special plea in bar, "That "he had sold the said negro woman with her two children "to the plaintiff, who, by his deed in writing, bearing date, "&c., did agree that the sale of the slave in the declara- "tion mentioned should be void and defeasible, and the "title of the plaintiff in her forfeited and vested in the

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" defendant, if the said plaintiff should sell, hire, convey " away, or otherwise divide the said slave from her two " children, until they should respectively attain the age of " ten years, unless such sale, &c. should be of the mother " and children collectively and all together, upon the de- " fendant's paying to the plaintiff the sum of 500 dollars; " that the plaintiff had broken the condition of the said " agreement, and forfeited his title in the said negro wo- " man, by making a distinct sale of her in exclusion of " her children before they respectively attained their age " of ten years, whereby, &c.; and that the defendant ten- " dered to the plaintiff the 500 dollars, which he refused " to accept."

In detinue, the defendant pleaded *non detinet*, & a special plea in bar; to which pleas there was a general replication, denying the truth of them both; and issues were joined. A general verdict for the plaintiff was considered sufficiently responsive to both the issues.

To this plea there was a replication, denying the fact of having separated the mother from her children, and also of the tender of the 500 dollars—On these pleadings issues were joined.—

At the September term, 1806, commissions were awarded, by consent, to take the depositions of two witnesses *de bene esse;* and, at the Court, when the cause was tried, the defendant moved for a continuance, *on affidavit filed*, of the absence of material witnesses; but his motion was overruled. No bill of exceptions was tendered to the opinion of the Court. The Jury, who were sworn to try the *issues*, found a general verdict for the slave in the declaration mentioned, &c. On this verdict judgment was rendered, and an appeal taken to this Court.

An appeal may be taken out of its turn on the docket, as a delay case, if the counsel for the appellant will not say, in general terms, that, in his opinion, there is error, but merely states points which, in the opinion of the Court, do not constitute error.

The Attorney General, for the appellant, moved for a *certiorari*, suggesting diminution in the record.

Per Curiam. A *certiorari* is granted, of course, unless delay appear to be the object.

Wirt, for the appellee. This is considered an appeal merely for delay; and the *certiorari* will have the effect of producing still greater delay. He therefore moved to take up the cause, out of its turn on the docket, in order to open the record, and have the judgment of the District Court affirmed.

Attorney General. The record is incomplete, because it omits the affidavit made by the appellant, (the defendant in the District Court) as the ground of a continuance. This record states that a motion was made by the defendant for a continuance *on affidavit filed* of the absence of

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material witnesses.—The affidavit itself, which is not inserted in the record, specifies what he expected to prove by those witnesses, and that due diligence had been used to obtain their attendance. This was the same as if a bill of exceptions had been scaled. In the case of *Hook v. Nonny* (*a*) this Court determined that the Court below erred in not allowing a continuance of the cause, when the party had brought himself within the rule of law.

(*a*) April, 1806, MS.

Wirt. In the case of *Hook v. Nonny*, there was a bill of exceptions, which showed the whole ground, and enabled this Court to determine whether the motion for a continuance was rejected on legal principles, or not. A mere affidavit, which was not made a part of the record, is a very different thing from a bill of exceptions. The Court, in this case, might reject the motion for a continuance from circumstances apparent on the record. This was probably the case; for it appears, that at the September term, 1806, commissions were awarded to take depositions; but no evidence was taken.

Attorney General. There is no difference whether a bill of exceptions was scaled or not. The defendant filed an affidavit, stating the ground of his motion for a continuance; and, if there were any extraneous reasons why the cause should not be continued, the other party should have spread them upon the record. This case is the same, in substance, as that of *Hook v. Nonny*. There the party, on being overruled as to the continuance, spread his affidavit on the record; but it was still nothing but the affidavit of the party.

Judge TUCKER said it would be a dangerous precedent to allow affidavits to be a part of the record; unless made so by an exception.

Judge ROANE. The affidavit might have been rebutted by extraneous evidence; and the party should have spread the whole case on the record.

Judge FLEMING. The affidavit was no part of the record unless made so by an exception.

Judge LYONS, of the same opinion.

Certiorari refused.

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Wirt then moved the consideration of the cause as a mere delay case.

Per Curiam.—It is not the practice to take up a cause out of its turn on the docket, as a delay case, if the counsel on the other side, say, that in their opinion, there is errour.

Attorney General. The only point in the cause is this: There were two pleas; one, the general issue, the other, a special plea in bar, on which issue was joined. The jury found a verdict generally for the plaintiff; and there was a particular fact growing out of the special plea, which was not found by the jury. It is a well settled principle, that a jury must answer to the whole case put in issue. So, if there be several issues joined, the jury must find upon them all, or it will be errour.

Wirt. The jury have substantially found both issues. There was, besides the general issue, a special plea, which was denied by the replication; and the jury, having found generally for the plaintiff, falsified both pleas of the defendant.

The cause was taken up as a delay case, and the judgment of the District Court AFFIRMED.

HOSKINS *against* WRIGHT, Admr. of HOSKINS.

Tuesday, 30th June.

Where an action is brought against an executor or administrator on an account, any items in which bear date more than five years before the death of the testator or intestate,

The appellant having brought an action on the case against the appellee in the County Court of *Essex*, a verdict and judgment were given for the defendant in August, 1801. The plaintiff appealed to the District Court of *King and Queen*, where the judgment was affirmed, and from the judgment of affirmance the plaintiff again appealed.

The declaration as amended is in assumpsit. The first count is a general *indebitatus assumpsit* for a negro slave, a tract of land, divers sums of money had and received, and divers sums of money laid out and expended. The sum in which the intestate is said to be indebted *on all these accounts* is £250, but the amount of each is not distinguished. The second count is *quantum valebat* for a

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negro slave sold and delivered.—The third is a special *indebitatus assumpsit*, stating that the intestate had given an order on *Hill* and others, executors of his father, directing them to pay the plaintiff £50 11 8 out of his part of his father's estate: that the intestate afterwards fraudulently prevented the plaintiff from receiving this sum, and himself received it, by reason whereof he became liable to pay, &c. and in consideration thereof assumed, &c.

The defendant pleaded to the original declaration *non assumpsit*, and *non assumpsit* within five years. These pleas were not withdrawn, but a new plea of *non assumpsit* appears to have been put in to the amended declaration.

A verdict was found for the defendant and judgment entered accordingly. The plaintiff filed a bill of exceptions, which states, that, at the trial of the cause, he offered in evidence an account containing debits and credits, which is stated at large; (the charges in which bear date previous to the year 1787;) and a deed of bargain and sale in the usual form, from the plaintiff to the defendant's intestate, for a tract of land, with a receipt for the purchase money indorsed, bearing date on the 28th September 1797; and proved by oral testimony that the land charged in the account was the same land conveyed by the deed; that the intestate died in May 1798; that, twelve or thirteen months before he died he told a creditor of the plaintiff that he would pay the plaintiff's debts; that the plaintiff proved by said creditor that the defendant's intestate told him he had bought land of the plaintiff, and would pay his debt to him, amounting to above £20: that it was afterwards paid, not by the defendant's intestate, but by a certain *John Hoskins*; and that, within five years before his death, the said intestate bought of the plaintiff five acres of land, worth thirty shillings the acre; that the defendant moved the Court to expunge all the charges in the account dated five years before the death of the intestate, which the Court decided should be done, *and directed the Jury to disregard the charges in the said account.*

it is not necessary that the Court should *actually expunge* those items; but if they decide that it shall be done, and direct the Jury to disregard them, it is sufficient.

General *indebitatus assumpsit* will not lie for the price of a tract of land; but a special action ought to be brought stating the circumstances of the contract.

Randolph, for the appellant. The question does not depend on the genuineness of the account, but on the instructions of the Court, by which the Jury were directed to disregard the items, and thereby the plaintiff was prevented from going into his proofs before the Jury. The County Court ought to have exercised its own discretion, and not left it to the Jury to expunge the items. The law

is express upon this subject.(*a*) Notwithstanding the language of the law is explicit that the Court shall, in suits brought on open accounts against executors or administrators, cause every item to be expunged which appears to have been due five years before the death of the testator or intestate, yet there are cases in which it may be necessary to retain them: for instance, where a person comes within some of the exceptions of the law: or where there has been a subsequent assumpsit within the five years.

If any items of debit be expunged, correspondent items of credit ought also to be expunged. In this case, there are credits dated on the same day with debits amounting to the same sum. Subjects which are correlative ought to share the same fate.

(*a*) See Rev. Code, vol 1, ch. 92, sect. 56, pa. 167.

The item of the draft on *Hill & Co.* stands on a writing, and not on open account. It consequently ought not to have been expunged.

With respect to the item for a tract of land, it was something more than a mere matter of account: the deed shows the cause of the debt, and the claim may be traced back to that instrument. This debit was created in less than five years before the death of the intestate; and the receipt for the purchase money, being a mere matter of form, would not prevent a recovery.

Judge LYONS asked whether general *indebitatus assumpsit* would lie for the price of a tract of land. He had always understood the practice to be, to bring a special action, stating the circumstances of the contract.

Wickham, for the appellee. It was impossible for the County Court to have decided otherwise than it did. The law is positive that such items as bear date five years before the death of the testator or intestate, shall be expunged. As to the objection that the Court directed the Jury to disregard the items, it cannot seriously be relied on. The law does not direct *any one* of the magistrates to perform the manual operation of expunging the items, and it is physically impossible for *all* to do it. The direction of the Court to the Jury, was substantially the same, as if the Act had been performed by the Court itself. But, in effect, the *Court did it;* because the Court directed it to be done. It would be strange, indeed, if the Court should, in a mere formal manner, erase the items of an account, and still leave it to the Jury to decide on the evidence respecting them. It is said, however, that circumstances may

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occur which would render it improper to adhere to the strict letter of the law; such as parties coming within the exceptions of the Act, or a reacknowledgment of the debt within five years before the death of the testator. It is admitted that this last is an important question; and whenever it shall come directly before the Court, it will deserve a very serious consideration. But it does not occur in the present case.

Whether the corresponding credits ought to have been struck out or not is of no consequence, in this case, as all the items bear date more than five years before the death of the intestate. The plaintiff had no debits, and the defendant could not have had a judgment for his credits.

General *indebitatus assumpsit* will not lie for the use and occupation of land, because it savours of the realty; *a fortiori* it will not lie for the price of the land itself. The receipt for the purchase money is said to be merely formal; but still a man cannot, in a Court of law, go into evidence to contradict his own deed under hand and seal. The mere general declarations of the intestate, that he would pay the debts of the plaintiff, has no weight. They cannot be applied to this demand; and he might have intended to become his security for the payment of his debts to others.

But, independently of the Act of Assembly, this account ought not to have gone to the Jury. Nothing can go in evidence to the Jury, unless it applies to some count in the declaration. The item for the price of the land ought to have been struck out, because it is a subject for which an action is not sustainable, in the form in which this suit was brought. Here are four distinct causes of action blendid in one count; and, if general *indebitatus assumpsit* will not lie for the land, then the mere circumstance of blending that subject with others and demanding one entire sum vitiates the whole count.

The count upon the order on *Hill & Co.* could not be supported, because it states no consideration whereon to found an assumpsit.

Randolph, in reply. As to the objection that general *indebitatus assumpsit* will not lie for the price of a tract of land; suppose after making the deeds, in which the receipt of the purchase money is *formally* acknowledged, the vendee promises to pay it, would not this be a sufficient foundation for an assumpsit? On the same principle, if *a capias ad satisfaciendum*, be taken out, and on a promise of payment by the debtor the execution is suspended by the

creditor, although another execution cannot issue, yet an action may be maintained on the promise. The item for the land is charged within less than five years before the death of the intestate, and therefore ought not to be expunged. But it is said, that the whole count in which the price of the land is declared for is vitiated, because that subject is introduced into it. Is there any reason why all matters which may be consolidated in one declaration, may not be blended in one count. The objection has no principle to support it. Besides, this is not the time to make an objection to the declaration: it should have been done by a demurrer.

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Curia advisare vult.

Wednesday, 1st July. By the whole Court, consisting of Judges LYONS, FLEMING, and TUCKER, (Judge ROANE being absent, from indisposition,) the judgment of the District Court was AFFIRMED.

OVERSTREET and another *against* MARSHALL.

Wednesday, 1st July.

Marshall brought an action of debt against *Overstreet* and *Holcombe* in the District Court of *Prince Edward*. The declaration set forth, that, on the 18th of April, 1781, the defendants gave their writing obligatory to the plaintiff, for the payment of 14,000 pounds of tobacco, under the penalty of £20,000 lawful money of *Virginia*, with condition to be void, if the state of *Virginia* should pay unto the plaintiff 14,000 pounds of tobacco, or the value thereof, for a certificate which he had received from the defendant, *Overstreet;* and assigned for breach, that neither the state nor the said defendants had paid the tobacco to the plaintiff, although the defendant, *Overstreet*, had possessed himself of the certificate, and applied it to his own use. The defendants pleaded "*payment*," on which issue was joined. The jury found a verdict for the plaintiff, and assessed damages to one penny; and thereupon judgment was entered for £20,000, to be discharged by the payment of 14,000 pounds of inspected tobacco, with interest at five *per cent.*, from the 18th of April, 1781, till payment with the damages and costs.

A. executes a writing obligatory to B. for the payment of *tobacco*, under a *pecuniary* penalty, with a condition annexed, that it shall be void if C. shall pay the tobacco, or its value to A. In an action brought on this writing the declaration assigns a breach of the condition, and the defendant pleads pay-

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To this judgment a writ of supersedeas was obtained by *Overstreet & Holcombe.*

Wickam, for the plaintiffs in errour, contended that the penalty of the bond ought to have been scaled, according to the Act of Assembly passed in 1781. (*a*) The verdict of the jury had no reference to the currency in which the bond was given; and of course the fifth section of the Act of 1781, just cited, cannot apply so as to permit the debt to be settled on equitable principles. The penalty, being the debt, in law, must be scaled, although the condition be for the payment of tobacco. On the same principle it was decided, that the scale should be applied to a guardian's bond.

ment. The verdict and judgment ought to be for the penalty, to be discharged by payment, not of the *tobacco* with interest thereupon, but of *damages*, for breach of the condition.

The penalty of such a writing obligatory, where it was executed in the time of depreciated paper money, ought to be reduced by the scale.

The penalty of the bond being in money, the condition, which was for the payment of tobacco, was collateral to the bond; and, for that reason, as well as on account of the form in which the plaintiff thought fit to declare, the judgment ought to have been given for the penalty of the bond, to be discharged by the payment, not of *tobacco*, but of such *damages in money* as should have been assessed by the jury; and no judgment could lawfully be given until such assessment. At common law, tobacco stood on the same footing with wheat or any other commodity; and the same kind of action ought to have been brought for its recovery. The Act of Assembly, (*b*) indeed, puts tobacco on a different footing from other commodities, and allows an action of debt to be maintained on a bond given for the payment of it; but, that being an innovation on the common law, the Act must be strictly pursued. In this case the suit is on the penalty of the bond for *money*. It is, consequently, not embraced by that law, but by the Act which directs the mode of proceeding on bonds with a collateral condition. (*c*) A collateral condition is defined in *Coke on Lyttleton* to be, where the condition is collateral to the penalty.

(*a*) Chan. Rev. 147.

(*b*) Rev. Code, ch. 29. sect. 3, pa. 36.

(*c*) See Rev. Code, ch. 76. sect. 21, pa. 110.

But there are other circumstances which make the condition of this bond collateral:—the obligor is to pay, in the event that the state of *Virginia* does not:—it is also in the alternative, either to pay money or tobacco; and, in this case, the party has not his choice to demand which he pleases, because there is no day limited.

No part of the record or proceedings warranted the giving judgment for interest on the tobacco, from the date of the bond, or from any other definite period; because, to-

bacco being merely a *commodity*, the obligor was not bound to carry it to the obligee, and interest would not run, till a demand was made.

Hay, for the defendant in errour. The bond was to pay tobacco, under a pecuniary penalty;—of course it was a tobacco debt. There was a contract annexed, that, if the state should pay the debt, the obligation should cease. The practice in the old General Court was said to be, to enter up judgment for the penalty, to be discharged by the tobacco mentioned in the condition.

Until application was made to the state, it was a tobacco contract; and upon the failure of the state to pay, the *appearance* of the contract was, indeed, changed, but it remained *substantially* the same; and the bond might have been discharged by the payment of 14,000 pounds of tobacco.

This case comes within the provisions of the latter clause of the Act of Assembly last quoted by *Mr. Wickham*, which directs, that in actions brought on bonds for the payment of money, judgment shall be entered for the penalty, to be discharged by the principal sum expressed in the condition, with interest.

In England, judgment could only be entered for the penalty, to be discharged by the principal sum of *money* expressed in the condition, with interest; because, in that country, tobacco is only a commodity; but, *here*, the law authorises an action of debt for its recovery. Hence, in *England*, the condition of a bond to pay tobacco would be collateral; but in this country it would not, because it would only be to pay what the law authorises you specifically to recover. English authorities, therefore, do not apply. As, in this country, judgment may be entered, and execution issued for tobacco, there is no good reason why the judgment should not be entered as it has been in this case.

There was no necessity for the jury to inquire into the *value* of the tobacco, because a judgment may be rendered for tobacco itself. The comparison of tobacco with wheat would be just in *England*, but not in this country: for here you can obtain judgment for *tobacco* but not for *wheat;* nor can you get judgment for either in *England*. The true definition of a bond with a collateral condition is, where the condition is for a thing for which debt will not lie. If the stipulation be, that a third person shall pay a sum of *money*, it is not collateral; nor would it be neces-

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sary for a jury to inquire into the value of the thing; because, being *money*, the value is already ascertained. But, if the condition be, that a *specifick act* shall be performed by a third person, it is collateral.

The payment not having been made by the State, the parties were thrown back on their original bond, as if no such stipulation had been annexed thereto; and *Marshall* had a right to demand interest, which, being only at *five per cent.*, was less than he would have received, if payment had been made by the State.

The essence of this contract was for the payment of tobacco;—the bond is expressly for the payment of 14,000 pounds of tobacco, under a pecuniary penalty; of course, the scaling law does not apply to it; nor is it within the reason of a guardian's bond, which is for the payment of *money*.

The law ought to be literally interpreted; and, where the contract was originally for tobacco, it would be highly unjust to defeat the party of his just claim to tobacco, even if the *form* of the contract was subsequently changed, which is not the case here.

Wickham, in reply. The stipulation annexed must be considered as part of the condition of the bond. The case of *Gordon v. Frazier* and *Cosbie* (*d*) proves this, and was a stronger case than the present. *There*, the *obligees alone* made an *indorsement* on the bond; *here*, the stipulation was in the *body* of the instrument, and the act of *both parties*.

(*d*) 2 Wash. 130.

The condition of an obligation is always collateral where it is to pay or deliver a thing different in its nature from the penalty, or where an act is to be performed by a third person.

In this case there being no liability on the obligors, till there was a default on the part of the State, and notice thereof given, no interest could accrue till such notice, and a demand made.

The scale of depreciation certainly applies to this case: for judgment could not have been entered otherwise than for the penalty, and, of course, ought to have been according to the scale.

Thursday, 2*nd July*.—By the Court, consisting of Judges *Lyons*, *Fleming*, and *Tucker*, (Judge *Roane* being absent, from indisposition,) the judgment of the District Court was unanimously REVERSED; because, "the plaintiffs in errour having pleaded 'payment,' and the jury,

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" having found, that the debt was not paid to the defen-
" dant in errour, should have assessed damages for the
" breaches, assigned in the declaration, of the agreement
" in the condition of the obligation mentioned, and judg-
" ment should have been entered for the penalty of the
" bond, which, being in the time of depreciated paper mo-
" ney, should have been reduced to specie, according to
" the scale, as settled by law, at the date of the said bond;
" and, when so reduced, to be discharged by the payment
" of the damages assessed by the jury, and the costs, and
" not by the payment of the tobacco, which the State of
" *Virginia* was to pay in discharge of the said bond, ac-
" cording to the condition thereof."

PRICE'S EXR. *against* WARREN, Admr. of FUQUA.

Wednesday, 1st July.

Warren, as administrator of *Fuqua*, brought an action of debt, in the District Court of *Prince Edward*, against the executor of *Price*, on a bond executed in the year 1772, by his testator, in the penalty of £400, conditioned for the payment of £200. The defendant pleaded payment, on which issue was joined; and a general verdict and judgment were rendered for the plaintiff, with interest at five *per cent.*, for twenty years, one penny damages, and the costs.

A new trial ought not to be granted on the affidavits of two of the Jurors, that they were influenced in their verdict by information given by one of their own body in the Jury-room.

The defendant, after judgment, filed a bill of exceptions in the following words:—(" Upon a motion for a new tri-
" al.)—Presumptive payment was urged, in this cause,
" from the length of time;—a motion was made by the
" defendant's counsel for a new trial, stating two jurymen
" had declared, that one of their own body, who was not
" examined, said in the juryroom, that he knew the tes-
" tator of the defendant, and that he was so accurate a
" man in his affairs, that he would have taken a receipt on
" the bond if it had been paid, and that two of the jurors
" declared, that this circumstance alone influenced them
" to find for the plaintiff; which the plaintiff's counsel ad-
" mitted *as if proved by affidavits of two of the jurymen*,
" which motion was overruled this 7th day of April, 1802;
" because it would be dangerous to admit a new trial on
" such information from the jurymen, and the new trial in

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"in this cause would be against the justice of the case, to "which opinion, &c."

To the judgment of the District Court a writ of supersedeas was awarded.

Hay, for the plaintiff in errour. This case depends on a principle settled in the case of *Cochran v. Street* (*a*)—The rule of law is positive, that a juror knowing any thing relative to the point in issue must give testimony in open Court. The propriety of this rule is obvious, because where evidence is offered by one party it may be repelled by the other; but if the jury find their verdict on testimony not known to the parties, they may be influenced by a view of the case which neither party expected, and which, if made known in Court, might be proved to be erroneous. In this case it was peculiarly necessary that the rule of law should have been observed. The bond was dated in 1772; and the Court would have instructed the jury to find for the defendant, on the presumption arising from the length of time; but they found a verdict on evidence of which the Court knew nothing.

(*a*) 1 *Wash.* 79.

The only difference between this case and that of *Cochran v. Street* is, as to the number of jurors whose affidavits go to prove the irregularity of the course pursued by their own body. The case from *Durnf.* and *East*, mentioned by the President, in delivering the opinion of the Court, (where a new trial was refused upon the affidavits of two of the jurors stating, that the case was decided by cross and pile,) depended on quite different principles. There the evidence went to prove misbehaviour in the jury, and had no relation to the merits of the case. In the case of *Cochran v. Street* the verdict was objected to, on the ground that four of the jurors, (whose affidavits were taken,) were opposed to any damages, and yielded to the verdict from a mistaken idea that a majority must govern. It was so improbable that a juror should be thus ignorant of his rights and his duties, that strong evidence was required to establish the fact, and a majority of the jury confirmed the truth of the circumstance to which those four had deposed. In this case there was no improbability in one of the juror's having given evidence to the rest after they had retired from the bar. The policy of the law, therefore, which requires the concurrence of a great number of the jury to impeach the verdict did not apply to prevent the Court from granting a new trial on the affidavits of the two jurors.

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Wickham, for the defendant in errour. The case of *Cochran v. Street*, which has been relied on by *Mr. Hay*, is a conclusive authority against him. There the Court set aside the verdict, expressly on the ground that it was founded in mistake, which was positively sworn to by four of the jurors, and their testimony was supported by a great majority of the others. If the affidavits of *two* jurors would be sufficient to set aside a verdict, that number might be often tampered with.

The jury, in this case, were not influenced by any facts which appeared in evidence in Court, but were regulated by their own opinions only: and to this objections are made. But for what purpose is a jury of the vicinage required by the laws of this country? One of the excellencies of this regulation is, that the jury, being acquainted with the characters of the parties, are more able to draw proper inferences from the transaction. But I principally rely on the dangerous tendency of suffering a verdict to be disturbed by the evidence of so small a number of the jury—Again, the granting of a new trial is to be exercised by the Court with *sound discretion;* and a new trial ought not to be granted against the *justice* of the case.

Thursday, July 2nd—The judgment was unanimously AFFIRMED by the Court consisting of all the Judges.

PEGRAM *against* ISABELL.

Wednesday, 8th July.

In a suit for freedom, if the Jury find a verdict for the plaintiff, subject to the opinion of the Court, upon a question whether the record of another suit, in which the plaintiff's mother recovered freedom, (not

This was an appeal from a judgment of the District Court of *Petersburg*.

Isabell, styling herself an *Indian* and a pauper, presented her petition to the Court (which petition was inserted in the record) praying to be permitted to prosecute her suit, *in forma pauperis*, for the recovery of her freedom, against *Elizabeth Pegram* who detained her in slavery. Her petition being allowed, and counsel assigned her, she commenced an action of trespass, assault and battery, and false imprisonment. The defendant pleaded that the plaintiff was her slave; and the plaintiff replied that she was free; whereupon issue was joined. At the trial of the cause, the counsel for the plaintiff offered, "as conclusive "evidence that *Nanny* (whom he proved to be the mother

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" of the plaintiff) was entitled to her freedom, a record" (which he set out in *hæc verba*) of a suit in the said District Court, in which *Nanny* and others had recovered their freedom from a certain *Stephen Mays:* in which suit no issue was made up between the parties, but the Jury were sworn upon a writ of inquiry.

The Jury, in the case of *Isabell v. Pegram* found a verdict fort he plaintiff, that she was free and not a slave, subject to the opinion of the Court upon the question, " whether the said record" (in the case of *Nanny* and others *v. Mays*) " is conclusive evidence, (as between the " parties to the present action,) that the plaintiff's ancestor " was a free woman." The District Court was of opinion that the law was for the plaintiff, and gave judgment accordingly: from which judgment an appeal was taken to this Court.

against the defendant but another person,) is conclusive evidence (*as between the parties to the present action.*) that the plaintiff's mother was a free woman; but do not state that the plaintiff was born after her mother was entitled to freedom, or that her mother was born free: the verdict is uncertain and insufficient, and a *venire de novo* ought to be awarded.

Hay, for the appellant. The immateriality of the statement of facts and finding of the Jury, in this case, is such, that no judgment can be given. If the record be evidence, (which is not admitted,) and prove *Nanny* free, it does not necessarily follow that *the plaintiff* is free; because she might have been born before her mother acquired her freedom. The verdict does not find that *Nanny* was *born* free: and, for any thing that appears in the record, she might have been emancipated after the birth of the plaintiff. The verdict is, consequently, insufficient, and a *venire de novo* ought to be awarded.

If it were necessary to discuss the question whether the record between *Nanny* and *Mays* be conclusive evidence, as between the parties to this action, I should contend, that, so far from being conclusive evidence, it was no evidence at all. Cases need not be cited to prove, that a verdict between A. and B. is not evidence between C. and D. A verdict, to be *conclusive evidence*, must be between parties or privies to the former suit. This is expressly laid down by the President, in delivering the opinion of the Court, in the case of *Shelton v. Barbour.* (*a*) In this case, there is no privity between *Mays*, (against whom *Nanny* recovered her freedom,) and *Pegram* the present appellant.

Query. How far, in a suit for freedom, can the record of a previous recovery of freedom by a female ancestor of the plaintiff (*not against the defendant, but another person*) be given in evidence?

(*a*) 2 *Wash.* 67.

George Keith Taylor, for the appellee. It would be a subject of much regret, if the party should lose her freedom by a mistake of her counsel. But, if it be an errour, it is in conformity with the uniform practice of the District Courts.

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As to the objection, that the time when *Nanny* was entitled to her freedom does not appear; it is obviated by the petition of the appellee, stating that she was *an Indian*. The point before the District Court was, whether the plaintiff there, was an Indian or not. If she were an Indian, she was entitled to her freedom, unless a right to retain her in slavery under some particular law could be proved. As she is thus found to be an Indian, all objection to the sufficiency of the verdict must be at an end.

The opinion of the President, in *Shelton v. Barbour* will not be controverted. Though a verdict be not *conclusive evidence*, except between parties or privies, yet it may, in all cases, be offered to prove the particular fact, for which it is introduced. If it were not so, what monstrous inconveniences would result! Suppose the descendant of a person who had recovered her freedom be taken in slavery, and all the witnesses were dead, who could prove the right of the ancestor to freedom? The depositions of those witnesses, if previously taken, could not be read, because not taken between the parties in the cause. If the record of the recovery of the ancestor could not be read in evidence, the descendant must forever remain in slavery. In the case of *Jenkins v. Tom* and others (*b*) the declarations of old people were considered legal testimony to prove the right of the appellees to freedom. What strange inconsistency would it be to admit *hearsay evidence*, but not *a record* to prove the same fact.

(*b*) 1 Wash. 123.

There is a manifest distinction between a record, which operates as an *estoppel*, and absolutely precludes the party from making any defence, and a record introduced to prove a particular fact, leaving the party free to defend himself by other evidence. In the case of *Lee*, executor of *Daniel v. Cook* (*c*) the principle is recognized, that a record may be introduced as evidence to prove a particular fact, where it would not be conclusive.

(*c*) 1 Wash. 306.

Hay, in reply. The question before the District Court was, whether *Isabell* was entitled to her freedom or not; but the point which the record was introduced to prove, was, that another person was entitled.

The petition of the appellee styling herself an *Indian*, is not evidence: but, if it were, it would leave the case open to the full force of my objection, because she claims her freedom as an *hereditary* right.

The record was not merely introduced to prove a particular fact: for the Jury expressly refer it to the Court to

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say, whether the record was conclusive evidence, *as between Pegram* and *Isabell*, to prove that the mother of *Isabell* was a free woman; still submitting the abstract question whether it was evidence between the parties.

I cannot perceive the soundness of the law or logick, that a record, though not evidence, unless between parties or privies, yet may be introduced to prove the fact which it professes to prove. It is either evidence or not: and no case can be produced where it has been omitted under such restrictions as are contended for. In truth the record was *no evidence*, and could not be introduced to prove any fact.

The case of *Tom* and *Jenkins* was very different from this. There *hearsay* evidence was admitted to prove a *pedigree;* which, considering the indulgence allowed to paupers in tracing their descent, might not be improper. In *Hudgins v. Wrights* (*d*) it was decided that a claim for freedom might be established, although the proofs did not agree with the case stated.

(*d*) *Ante* p. 134.

The consequences would be fatal, indeed, if the mere inquest of a Jury, sworn on a writ of inquiry, should be conclusive evidence of freedom. A person anxious to give freedom to slaves might suffer the ancestor to recover a judgment by default, and then offer a record of that judgment, as conclusive evidence against some other person, not a party to the suit, and holding some of the descendants in slavery. In the present case, *Mays* might have suffered *Nanny* to recover her freedom, whether right or not: for it appears that he made no defence.

Thursday, 9*th July*. The President delivered the unanimous opinion of the Court, (all the Judges being present), " that the case stated and referred to in the ver- " dict of the Jury, in this cause, was too imperfect for " this Court to determine the question of law arising " upon it." Verdict set aside and a new trial granted.

Wednesday, 8*th July*.

WHITING *againt* DANIEL and others.*

A deed of conveyance for slaves having been

On an appeal from a decree of the Superiour Court of Chancery for the *Williamsburg* district.

* See the rule of the Court, adopted, in this case, with respect to the reading of records in Chancery cases, at the end of the decisions of this term.

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Daniel and twenty-three others filed their bill in the said Court, stating that they were the only slaves of a certain Miss *Mary Robinson*, who on the 10th of March 1803, made and published her will in due form of law, in which is the following clause; "After all my just debts and fu- "neral expenses are paid, as I cannot satisfy my consci- "ence to have my negro slaves separated from each other, "and from their husbands and wives, &c. &c., I desire "and will that the whole of them, that are my property "at the time of my death, as far as the law enables me to "do it, be emancipated;" that the testatrix, having appointed *James Ross* and *Mathew Whiting* her executors, departed this life in the same month; that on the 4th of July 1803, the will was proved in the county Court of *Gloucester;* though neither of the executors had qualified, nor was it believed that they would, as more than twelve months had elapsed since the death of the testatrix; that the debts due from the testatrix were but trifling; such as the other personal estate was sufficient to pay; that *Whiting* had taken them into his possession, not as executor, but as his own property; claiming them under a deed prior in date to the will; that, upon their instituting a suit for the purpose of setting up the will and vacating the deed as fradulently obtained, he had forcibly seised them and put them on board a vessel, with the avowed object of sending them to the state of *Georgia;* and that they were then on their way to that state; that the pretended deed under which *Whiting* claimed was executed by the testatrix under an idea that it operated merely as a power of attorney to enable him to recover the possession of the said slaves from a certain *William Curtis* by whom they were then held; and that the deed, which in many places was left blank, had been, by the said *Whiting*, altered and added to since the death of the testatrix, and had been recorded in the County Court of *Jefferson*, many hundred miles from the residence of the testatrix and of the defendant, and since her death. The bill prayed an injunction to restrain the defendant from selling, or in any manner disposing of the slaves, or removing them out of the jurisdiction of the Court; that the deed should be set aside, and that they might enjoy their freedom under the will.

signed, sealed, and delivered, with a blank left for the date, the donee afterwards inserted the date: no fraud, or imposition appearing to have been practised in obtaining it, and no evil design in filling up the blank, the deed was adjudged to be good; the date not being a material part thereof.

To the bill was annexed the affidavit of *George Ball* who stated that the complainants were the slaves (and he believed) the only slaves of Miss *Mary Robinson*, of the county of *Gloucester*, and were the slaves intended to be emancipated by her will; that the defendant had not quali-

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fied as executor, but had removed the slaves from *Gloucester* to *Norfolk* or *Portsmouth*, on his way to *Georgia*.

The answer of *Whiting*, (after stating the existence of two other suits brought by the same complainants for the same object, one in the County Court of *Gloucester*, the other of *Norfolk*, and praying that they may be removed by supersedeas and certiorari to the Superiour Court of Chancery for the *Williamsburg* District, and further consenting, that such of the complainants as he claimed as slaves might be considered parties, and have the benefit of any decree made in this cause,) stated that *Miss Mary Robinson*, who was his aunt, had for some time resided with her relation, *William Curtis*, who acted as her agent and enjoyed the labour of her slaves for reasonable hires; that, on some difference arising between them, *Curtis* turned her out of doors; but still retained her slaves. In this distressed situation she wrote to the defendant, then residing in the county of *Jefferson*, requesting him to come down and procure a habitation for himself and her in the county of *Gloucester*—to act as her attorney in the recovery of her slaves from *Curtis*—and finally promised that she would so provide that they should all become his property at her death; that the defendant, well aware of the fickleness of persons in her situation, expressed an inclination to comply with her request, but told her that, as he was to leave a part of the country where he was already settled, he wished to be on some certainty, with respect to the promise, before he changed his residence; that soon afterwards, she executed to him a letter of attorney for the recovery of the slaves, and, subsequently, a bill of sale for the slaves themselves; that a blank was left in the bill of sale for the insertion of the name of a negro child, which was not then known, and another blank for the day of the month, and the last numeral for the date of the year; that the deed was formally delivered to the defendant by the grantor, and, with it, one of the slaves, in the name of all the rest; that the negro child soon after dying, the blank, as to that, was never filled up; but, knowing that his aunt intended to convey all her right in the slaves to him, that she thought she had done so, and, at any time after the execution of the deed, would have consented to the insertion of the date, if required, and that the bill of sale was executed on the Saturday after Good Friday in April 1802, he did, in order to designate the date of the transaction, insert "18th," supposing himself, from all the circumstances, authorised to do so, especially as the omis-

sion of the date would not have vitiated the instrument, and its insertion was done with no improper design. Believing that his title in the slaves, arising from the contract, as well as the bill of sale and the delivery of one of them, in the name of the rest, was paramount, both in law and equity, to any interest conveyed by the will, he took possession of them long before the date of the will, and has held them since, not as executor, but as his own property. The answer admits the will to have been made (through the influence of bad advisers,) at the time set forth in the bill, and that *Mary Robinson* died possessed of sufficient personal property, other than her slaves, to discharge all her debts. It further admits, that the defendant, exercising the rights of a master over his slaves, was about to remove them to the state of *Georgia*, to prevent the machinations of those who had inspired them with a belief that they were free; but he denied that he could lawfully be restrained by the unauthorised indorsement of the clerk of the Court on the subpœna, before the Court itself had interposed;—which indorsement was the only restraining process with which he had been served before he put the slaves on board the vessel.

The depositions and exhibits filed in this cause proved, that *Miss Robinson*, though a woman of "fine understanding," was uncommonly "peevish, fretful, and whimsical;" that she had been turned out of doors by a relation with whom she had lived, who, notwithstanding, retained possession of her slaves; whereupon she frequently complained of being friendless, and said that no one would befriend her, till Mr. *Whiting* her nephew proffered his services, from whom she flattered herself she should be comfortably supported. It was further proved that while she lived with *Whiting* he was very "attentive and obliging towards her:" one of the witnesses, who knew her temper, said, that he "would not have boarded her on any terms," another, that he would "not have been in *Whiting's* situation for all her property." On the "day after Good Friday in "1802," (which from an inspection of the Almanack of that year, will be found to have been the 17th of the month) *Miss Robinson*, while at the house of a friend [Mr. *Baytop*] executed a letter of attorney, which bears date the 17th of April 1802, to the defendant *Mathew Whiting*, for the purpose of demanding a settlement of accounts between her and *William Curtis*, of regaining her slaves then in his possession, and of hiring them out. This instrument was attested by "*John Lewis* and *James Bay-*

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top," in the "dining room" at the house of the latter; the former of whom proved the acknowledgment of Miss *Robinson* to her seal and signature, when he attested as a witness, but he did not know the contents; the latter was consulted by Miss *Robinson* before the power of attorney was executed, whether she could revoke it by a subsequent act, and told her that she could, subscribed his name, as a witness, and knew the purport of it.

On the same day (as believed by most of the witnesses) and at the same house, but in a different room, and before a different witness, Miss *Robinson* executed a deed of gift, (called in the bill and answer a bill of sale,) to the defendant *Mathew Whiting* her nephew, whereby, in consideration of "natural love and affection, and for the further "consideration of his supporting her for life," she gave, granted, &c. to him all the negroes belonging to her, (designating them by name) and then in the possession of *William Curtis:* of which negroes she put him "in full "possession by delivering to him a negro woman named "*Judy* at the time of sealing" the deed.

This instrument was attested by "*James Kerney* Jr." whose deposition stated that, in the Spring of the year 1802, he accompanied *Mathew Whiting* from the County of *Jefferson* to that of *Gloucester*, and was several days with him and Miss *Robinson* at the house of Major *James Baytop;* that, on a Saturday, shortly before he left that County, the defendant and Miss *Robinson* came out of an adjoining room into "Mrs. *Baytop's* chamber," where he was sitting with several of the family; that Miss *Robinson* sat down at a desk near the witness, and the defendant handed her an instrument of writing which she looked over for some time and then signed, and the defendant asked the witness to attest it, which he did, upon Miss *Robinson's* acknowledging her hand and seal, when interrogated to that effect by the defendant. From a conversation between Miss *Robinson* and the defendant, the witness understood it to be a deed of gift from her to the defendant, for all her slaves. He had since proved the deed in the County Court of *Jefferson*, which deed was the only instrument he ever witnessed between the parties. Several of the family of Major *Baytop* proved the attestation of the deed by *James Kerney* Jr. "on the Saturday after Good Friday in 1802," in the manner stated by him, except that they did not all know its contents, and moreover proved, (as he stated,) *Whiting* and he left the house of Major *Baytop*, the same day, on their return up

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the country. It was further proven, that on thesame day on which the deed of gift was executed, Miss *Robinson* called a negro woman named *Judy* to the defendant, who gave her directions to remain where she was till his return; and, during his absence, to apply to Major *Baytop* for provisions for herself and children, who agreed to furnish them, of which fact Miss *Robinson* was informed. The character of *James Kerney* Jr. for probity, honesty, and veracity, was supported by several gentlemen of his acquaintance, of known respectability. On the 10th of March 1803, *Miss Robinson* made her will by which she directed all her slaves to be emancipated, and expressly enjoined it on the witnesses to keep the will a secret till it should be exhibited in the Court for probate. She died on the 14th of April, and the will was proved in *Gloucester* County Court, by the witnesses thereto, on the 4th of July 1803. On the 18th of August following, a bundle of papers, which had been lost by Mr. *Whiting*, was found and carried to Mr. *Ross* one of the executors named in the will of Miss *Robinson*. At his request, and in his presence, an inventory was made by a Mr. *Vidal* of all the papers; and their contents noted. Those among them which related to the present subject were the letter of attorney of the 17th of April 1802; another of the same tenour dated April 15th 1803; a copy of the will of *Mary Robinson* dated the 10th of March 1803, recorded the 4th day of July 1803, and attested by the clerk of *Gloucester* Court; an original letter from *James Kerney* to *Mathew Whiting* of the 20th of April 1803, in answer to his of the 26th of March, requesting the attendance of the said *Kerney* at *Gloucester* County Court for the purpose of proving the deed of Miss *Robinson;* in which letter Mr. *Kerney* states his recollection of having attested the deed, and the impossibility of attending, at the time required, to prove it; a deed of gift from *Mary Robinson* to *Mathew Whiting* for thirty slaves, besides children, in which a blank was left for the name of one of the children, the date of the month blank, and that of the year not entirely filled up, thus:

—"set my hand and seal this day of April 180 "
"Test."
"*James Kerney.*"

Mary Robinson (Seal)

—also a copy of that deed, (which, in the opinion of several witnesses was an original) with the only difference

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that the copy was dated " April the 15th, 1803."—Three witnesses deposed to the identity of the papers as above described; and one of them further declared, that the circumstance of the original deed being without a date, and the paper purporting to be a copy having dates, created in him a suspicion of fraud and practice which ought to be guarded against; and induced him to advise Mr. *Ross*, the executor named in the will, to take a memorandum of all the papers. These papers were delivered to Mr. *Whiting*, sometime in August 1803, and, as one witness deposed, in their original state;—but another witness, (who was not present at the moment of their delivery, and to whom they were shown by Mr. *Whiting*,) proved that the signature to the deed was in the handwriting of Miss *Robinson*, and that it was made upon the consideration of " natural love and affection and a life support," but that there were but two blanks in it, one for the name of a negro child, the other for the day of the month; and that the deed concluded thus:—

—" this day of April 18 hundred and two."

The blanks for the date having been filled up by Mr. *Whiting*, (as admitted in his answer) so as to read " this 18th day of April 1802," the deed was proved in the County Court of *Jefferson*, on the 13th day of December 1803, by the oath of *James Kerney*, Jr., the witness thereto, and admitted to record.

It was further proved that, in January 1803, Mr. *Whiting* hired out part of the negroes, and took the bonds in his own name; the rest he carried to a plantation which he had rented for the residence of his aunt, Miss *Robinson* and himself, with whom he lived till the time of her death, and that he continued to hold the negroes in his possession till the first of March 1805, when he removed them; that his intention to change his own residence was publickly avowed, and his determination to remove the negroes to the state of *Georgia* was not made a secret. Two witnesses (*Whiting's* overseer and his wife) proved that, in the Winter of 1803 Miss *Robinson* said " that she had given " all her negroes to her nephew *Mathew Whiting*," and another witness, whose land *Whiting* rented, established the same fact. The overseer farther stated, that in consideration of the negroes, Miss *Robinson* added, " that her " nephew was to support her for life."

The deed of gift being considered as imperfect in its original state, and as made void by the subsequent alterations, the slaves claimed their freedom under the will,

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and, after an ineffectual effort to obtain from the Court of *Gloucester* County certificates of freedom, (which the Court refused to grant on being informed of the existence of the deed) a subpœna was issued against *Whiting* returnable to that Court, with an indorsement showing the nature of the suit; but no bill was filed. *Whiting* determined to remove the slaves to the state of *Georgia*, in order, as it was suggested, to avoid the said process of the County Court of *Gloucester*, and embarked with them, (together with the overseer and his wife who proved the declarations of *Miss Robinson*) on board of a vessel for that purpose; but, having touched at the port of *Norfolk*, he was arrested by warrant from a magistrate on suspicion of having stolen the negroes. The Court of *Norfolk* County being then in session, a bill, praying for an injunction against his carrying the slaves out of the state, was exhibited in that Court, on the 21st of March 1804, and an order made directing the sheriff of *Norfolk* County to take the slaves into his possession, which was accordingly done. On the 3d of May 1804, another bill for a similar purpose was filed in the names of all the slaves in the Superiour Court of Chancery for the *Williamsburg* District; an injunction was awarded, and the sheriff of *Gloucester* County directed to take the slaves into his possession, to hire them out for the remainder of the year, to provide for such as were chargeable, to prevent the defendant from intermeddling with them, and to guard against their removal out of the limits of the County. Both of those bills were supported by the affidavit of *George Ball* an attorney at law; but neither appear to have been filed by the direction of any Court; nor does he appear to have been assigned as counsel for the plaintiffs, nor do they appear as persons suing in *forma pauperum*.

On a motion to dissolve the injunction awarded by the Superiour Court of Chancery for the *Williamsburg* District, the Judge, on the 26th of July 1804, changing so much of the former order as respected the sheriff of *Gloucester*, directed the sheriff of *Norfolk* County, in whose possession the slaves then were, to perform the duty assigned to the sheriff of *Gloucester;* except that the slaves were not to be hired for a longer term than till the 25th of October; and the sheriff of *Norfolk* was also directed to report his proceedings to the Court, on or before the first day of the next term. It was further ordered that the suits referred to

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by the defendant, in his answer, as depending in the County Courts of *Gloucester* and *Norfolk*, for the same cause, if then depending, be dismissed.

At the final hearing, on the 17th of April 1806, the Chancellor, being of opinion, "from the number of strong "presumptive circumstances and evidences of fraud ap- "pearing on the exhibits, that the deed from *Mary Ro-* "*binson* to the defendant, on its face bearing date the 18th "day of April 1802, was obtained by imposition, and that "the plaintiffs, under the will of the said *Mary Robinson*, "were entitled to their freedom, subject to the directions "of the said will, and the provisions in the Acts of As- "sembly relating to emancipated slaves," decreed that the said deed of the 18th of April 1802 be set aside, that the injunction be made perpetual, and the defendant pay to the plaintiffs their costs, &c.

From which decree an appeal was taken to this Court.

Warden, for the appellant. In this case, the only question is, whether *Miss Robinson* executed the deed referred to in the appellant's answer. If she did, and the deed be good, could she afterwards emancipate the slaves conveyed by it? The only objection to the deed is, the *want of a date;* for the witness proves it was duly executed. This being the case, and the consideration being good, she had no right to devise them in any manner.

But a deed without a date is good, because it operates from the delivery. The filling up the blank for the date could not, therefore, vitiate an instrument which was good without any date. Admitting the deed to have been void by that alteration, still the parol agreement remained, which was exactly what the deed afterwards declared; and, the appellant having performed the agreement, the other party was not at liberty to refuse. It was a moral obligation on the part of *Miss Robinson*, which raised a sufficient consideration in law.

Personal chattels pass by delivery. In this case the slaves were delivered, and the contract executed: and a suit might be sustained either on the deed or the parol agreement. (*a*)

(*a*) 1 *Powel on Contr.* 221.

This suit was improperly instituted by the appellees: for the person who conducted their business brought the suit in the ordinary way, and made his own indorsement on the subpœna; and the Judge's order was not made till three months afterwards.

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Wickham, on the same side, cited the case of *Bolton v. the Bishop of Carlisle*,(*b*) where the party set forth a deed the seal of which had been torn off; but the Court held that, as the deed had had its operation, and the property had passed, the breaking off the seal could not devest the estate.

G. K. Taylor, for the appellees. The right of the slaves to their freedom exists under the will of *Miss Robinson*. The question then is, whether the deed be a good one or not.

(*b*) 2 *H. Black.* 259.

The will is a solemn act, and the Court will not presume that the testatrix intended to commit a fraud. This is not, however, of itself sufficient to prove the deed fraudulent; but is relied on as a circumstance. *Whiting* is an executor named in the will. If the deed had not been fraudulent, and considered a mere nullity, she would not have appointed him.

But there are a variety of circumstances which prove the deed to be fraudulent. It cannot be presumed that *Miss Robinson*, in extreme old age, would have given thirty odd negroes absolutely for the mere consideration of a support for life. Knowing her own disposition, she would have taken care to preserve her own property; as *Whiting* might not have treated her as she liked. The sole purpose therefore for which she gave the power of attorney, dated the 17th of April 1802, (the same day this deed was executed,) was that of getting the property into her possession; at the same time she inquired whether she had not a right to revoke it by a subsequent act, and was informed that she had. The power of attorney was witnessed by her friends *Lewis* and *Baytop;* the deed, by *Kerney* only, whom she did not know; all her acquaintances knew of the existence of the power of attorney, but not of the deed. These are strong grounds to prove a fraud. The declarations of the overseer and his wife, that *Miss Robinson* said she had given all her negroes to *Whiting* are not entitled to credit; because those persons were found at *Norfolk*, aiding in carrying off the negroes. This deed, though executed in April 1802, was not recorded till December 1803; and *then* it was proved in the County Court of *Jefferson*, many hundred miles from where the property was, and where the deed was executed. No person proves the delivery of any part of the property in the name of the rest. One witness only says, that when *Whiting* was going away, he heard *Miss Robinson* call *Judy* to him; but he does not say that she delivered her.

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It is admitted that, when the deed was executed, it had no date. A copy was afterwards taken by *Whiting*; and the dates filled up with the "15th of April 1803," the day after her death; but when the deed was carried to be recorded, it was dated the "18th of April 1802," which was on a Sunday, and on that day *Whiting* was on his journey to the upper country. Here is a concatenation of circumstances to prove a fraud; and his afterwards shipping the negroes off leaves no doubt of the fact.

With respect to the law of the case; there can be no doctrine more firmly established than that the insertion of the date made the deed void.(*c*) This is founded in good reason; because the party ought not to be permitted to change his deed.(*d*) Modern decisions, indeed, have gone so far as to say, that if the alteration be made by a stranger under any circumstances, the obligee ought not to suffer by it. So, if the deed be lost or destroyed, as was the case reported by *H. Blackstone*.

(*c*) 11 Co. 27. *Henry* PIGOT's case.

(*d*) See 5 Co. 119, *Whelpdale's case*.

But it is said that the parol agreement is binding. There is no evidence of any agreement, except what is derived from the answer; and that, stating the agreement by way of avoidance, is not to be considered as evidence in the cause.

On no principle whatever ought *Whiting* to be aided in a Court of Equity. That *Miss Robinson* was in great distress is abundantly proved. She was turned out of doors by her relation *Curtis*, and her temper was such as to prevent her from being a welcome guest in the house of any of her acquaintances. In this situation *Whiting* took the advantage of her, and ought not therefore to have the benefit of his contract. (*e*) Here there was such an inadequacy of price as to prove clearly that *Miss Robinson* was imposed upon; and this according to a very high authority is sufficient grounds for setting aside the contract.(*f*)

(*e*) 2 *Powel* on *Contr.* 153.

(*f*) *Ibid.* 158.

Wickham, in reply. In this Court, the case now under consideration, will be decided not as a case of freedom, but in the same manner as if Miss *Robinson* had given her property to others, or had died intestate.

The will of the testatrix proves nothing: for, she being a party, her declarations could not be admissible testimony; nor is it competent to her to destroy her own deed. But the expressions of the will directing that the whole of the negroes *which were her property* should be emancipated, shows that she had doubts of her right to do so. The deed is in consideration of love and affection, and a

maintenance for life. Strike out the latter part, and still the consideration would be good. She had quarrelled with all her relations, except Mr. *Whiting*. It was natural, therefore, that she should select this nephew as the object of her beneficence. In making the agreement, and afterwards accepting of the deed, *Whiting* broke no moral law, and cannot justly be chargeable with a fraud. The power of attorney, even if made on the same day, which seems very doubtful, is not evidence of fraud; because she might not wish to state the existence of the deed to *Baytop* and his family, as they were also her near relations.

It has been objected that the concealment of the deed by Miss *Robinson* and *Whiting*, and the circumstance of its being recorded in the County Court of *Jefferson* are evidences of fraud—To these objections it may answered, that Miss *Robinson* told *three* persons, at least, that she had given all her negroes to her nephew *Whiting;* that he had them all in his possession, hired part of them out, and took the bonds in his own name. Four witnesses depose to the effect of the deed; and the answer, being responsive to the bill, is also evidence of the fact. Even if *Whiting* had mentioned the deed himself, (as it is proven he did to one person,) could his declarations have been given in evidence? As to recording it in the County Court of *Jefferson*;—it was unnecessary to record it *any where*: but the true reason was, that the witness resided in that county, and could not be got to the county of *Gloucester*.

But another proof of fraud is said to be, that the deed had no date. It is generally observed that, when fraud is intended, the utmost caution is observed in drawing the instrument. The probability is, that a blank was left, not knowing when the deed would be executed, and that it was a mere omission in not filling it up at the time.—But the date was inserted the day after her death!—Is it probable, that he would have done so, if he had intended a fraud?—The truth is, that he took a copy of the deed, and fixed the date, as on the day when he made the copy. There can be no doubt, from the testimony, but the old lady did execute the deed. She made such a bargain, as any person, in her situation, would be disposed to make.

It is argued, that the insertion of the date made the deed void; and 11 Co., *Pigot's* case, has been relied on to support that doctrine. If we go back to the days of Lord *Coke*, we shall find that, if the rats eat off a seal, the party, who executed the deed, might plead *non est factum*, and the title of the obligee would be forever lost. This

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doctrine has long since been exploded. The old practice was to declare on the original deed alone: but the modern practice, both in England and this country, is, to declare on a copy, whenever the original is either lost or destroyed.

But, says Mr. *Taylor*, in this case, the alteration was made by the *party*, and not by a *stranger*, as was the case in *Bolton v. The Bishop of Carlisle*.—It does not appear, from the report of that case by *H. Blackstone*, whether it was the act of the *party* or of a *stranger*. The date being filled up by the *party* makes no difference; as the law is now held to be the same in both cases.

It has been well observed by *Mr. Warden*, that, as the negroes, being personal chattels, would pass by parol, especially when accompanied by delivery of possession; and there being an actual delivery, in this case, to *Whiting*, his title would be good, even if the deed were set aside.

As to the *distress* of *Miss Robinson*; no such thing appears in evidence. She lived in the genteelest families, and had the command of the profits of thirty negroes.—With respect to *inadequacy of price*, there is as little grounds for complaint. She did not want the negroes, after her death: she was then far advanced in years, had no child to whom she could leave them, had quarrelled with all her relations except *Whiting*, and, in making the agreement with him, she had made a prudent bargain, by which she would be comfortably supported during her life, and would sooth her latter days with the reflection of having bestowed her bounty on one of her relations who most richly deserved it.

Curia advisare vult.

Saturday, July the 11th. The President pronounced the following as the unanimous opinion of the Court, "That it does not appear from the evidence or circumstances in this cause that any fraud or imposition was practised, or compulsion of any sort used by the appellant in obtaining the deed of gift in the bill mentioned from *Mary Robinson*, who was his aunt, for conveying to him all her right and title in and to the appellees who were then her own proper slaves, but that on the contrary, the said deed was made by her own free will and consent, for the consideration therein mentioned, on the seventeenth day of April 1802, and that no fraud was meditated by him in filling up the blank left for the date

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" of the said deed, after the same had been signed, sealed, " and delivered by her to him in presence of witnesses, " the date of the said deed not being a material part there- " of, as it would have been good and sufficient to convey " the said slaves without any date inserted therein, and " might have been inconsiderately filled up by him, " and that as he was and is fairly entitled to the said " slaves under the said deed and the repeated previous " declarations of the said *Mary*, that she had given him " the said slaves, fully proved by the depositions of sundry " witnesses taken in this cause, she had no right or pow- " er to emancipate them by her will made after the exe- " cution of the said deed: that the decree of the Superiour " Court of Chancery adjudging and decreeing the deed " aforesaid to be set aside as void, and the injunction to " restrain the appellant from exercising any acts of own- " ership over the appellees or otherwise intermeddling " with them, to be perpetual, is erroneous: that an ac- " count should be made up and settled, by or before per- " sons to be appointed by an order of the Court of Chan- " cery for that purpose, of the hire and maintenance of the " appellees by the Sheriff or Sheriffs of *Norfolk*, to whose " care they were committed by the several orders of the " county Court of *Norfolk*, the Superiour Court of Chan- " cery aforesaid, and of this Court; and, if the hire ex- " ceeds the maintenance and expenses of the appellees, the " overplush to be paid by the Sheriff or Sheriffs to the ap- " pellant; but, if the hire should be found deficient, then " the deficiency to be paid by the appellant to the Sheriff " having custody of the appellees who is, thereupon, or " upon receiving sufficient security to be approved of by " the said Superiour Court of Chancery, to deliver the ap- " pellees to him as his proper slaves; therefore it is de- " creed and ordered that the decree aforesaid be reversed " and annulled, that the said Court of Chancery do direct " an account of the hire and expenses to be made, of which " the appellant is to have notice; and, on payment made, " or security given, as above directed, for any deficiency " which may, on settlement of the account, appear to be " due to the Sheriffs, that the injunction be dissolved, and " that the appellees be delivered to the appellant as his " proper slaves, and that the bill of the appellees be dis- " missed."

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SAYRE Adm'r. of GRYMES *against* GRYMES.

Friday, 10th July.

This was an appeal from a judgment of the District Court held at King and Queen Court House, reversing an order of the County Court of *Middlesex*, by which administration with the will annexed of *Philip Grymes* was granted to the appellant.

An appeal or Supersedeas to a judgment ought not to be granted to any person not appearing to be interested in the matter in controversy.

In June 1805, the will of *Philip Grymes*, of *Brandon* was proved in the County Court of *Middlesex*. *Philip Grymes*, the relation of the testator, had originally been appointed one of the executors, but, by the direction of the testator, his name was struck out of the will. When it was exhibited for probate, he appeared, and insisted that a summons should issue to the parties interested to show cause why it should not be proved without this obliteration. The Court overruled the motion; to which opinion of the Court an exception was taken; *but no appeal was entered from the order* admitting the will to probate.

At the September Session, a summons was awarded, in the usual form, to four executors named in the will, requiring them to appear at the October Term, and declare whether they would qualify. Two of them appeared and refused to act as executors: the process was not executed on the two others. At this term, administration with the will annexed was granted to *Sayre*. A supersedeas was obtained to this order by *Philip Grymes;* and, at the April Session of the District Court of King and Queen, held in 1806, the court reversed the order, because the summons was not returned as to two of the executors. From which judgment an appeal was taken by *Sayre* to this Court.

Wickham, for the appellant.

Wirt, for the appellee.

For the appellant it was contended that the supersedeas was improvidently awarded and ought to have been quashed, as *Philip Grymes* was no party to the order appointing an administrator, and not even concerned in interest. That, if he were a proper party, the appointment of *Sayre* as administrator, without full service of the summons, was but an irregularity that might have been corrected by the County Court.

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On the part of the appellee it was insisted, that his appearance before the County Court when the will was proved, and taking an exception to the opinion of the court were sufficient to constitute him a party; particularly as the substance of those exceptions was stated in the bill of exceptions. That the object of the supersedeas awarded by the District Court was to compel the County Court to correct the errour, which had been committed in granting administration to *Sayre* without full service of the summons.

Saturday, *July* 11*th*. The Judges* delivered their opinions.

Judge TUCKER. *Philip L. Grymes* of *Brandon* made his will, and therein appointed his nephew *Philip Grymes* one of his executors, and executed it in the presence of four or five witnesses. At a subsequent day he directed the name of *Philip Grymes* to be struck out of his will, which was done in his presence by *Ralph Wormeley*, and a memorandum thereof, signed by *Wormeley* in his *own* name, (not the testator's) was made on the back of the will, and attested by two witnesses; one of whom was a subscribing witness to the will. The will was exhibited for probate in *Middlesex* County, June 1805. *Philip Grymes* opposed the proof, and insisted a summons should issue to all the parties interested to show cause why the will should not be proved without that obliteration. The Court overruled the motion, and admitted the will to record with the obliteration. *Grymes* excepted to the opinion of the Court; but did not appeal from the decision.

At September session, on the motion of *T. Churchill*, a summons was awarded to *Ralph Wormeley* and three other executors named in the will, to appear at the October term, and declare whether they would qualify or not. Two of them renounced the executorship. The process was not executed on the two others. At the same session, *Sayre*, who had married Mr. *Grymes's* daughter, and to whom a part of the estate after Mr. *Grymes's* death was devised, was appointed administrator with the will annexed; with the consent of Mrs. *Grymes*, as would appear from her being his security in the administration bond. *Grymes* did not appear, or contest *Sayre's* appointment in the County Court, but applied for and obtained a writ of

* Judge *Lyons* being interested did not sit in the cause.

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supersedeas to the order of October term appointing *Sayre* administrator. The District Court reversed that order, because the summons was not returned "executed" as to two of the executors. From this judgment of reversal *Sayre* appealed to this Court.

In *England*, the sentence of a Court of probates, granting administration of an intestate's estate, like the sentence of a Court of Admiralty, is a procedure to which *all the world* (as has been said) are parties; that is to say, any person, whose *interest* may be affected thereby, may appear and contest it, if he thinks proper, within a *limited* time; which if he fails to do, he is forever *concluded* by it afterwards. Our law provides, in like manner, that, when a will is exhibited to be proved, the Court (instead of summoning the heir; as was formerly necessary) may proceed immediately to receive the probate thereof: and grant a certificate of such probate: but if any person *interested* shall, within seven years afterwards, appear, and by his bill in Chancery contest the validity of the will, an issue shall be made up, whether the writing produced be the will of the testator or not, which shall be tried by a jury: but, no such party appearing within that time, the probate shall be forever binding. L. V. Edo. 1794. c. 92. s. 11. So, if a person dies, or is supposed to die intestate, if no person applies for administration within thirty days from his death, or at the next succeeding Court thereafter, the Court may grant the administration to any creditor or creditors, or to any other person in their discretion: but if any will be afterwards produced and proved by executors, or the wife or other distributee, who shall not have before refused, shall apply for the administration, it shall be granted, as if the former had not been obtained. *Ibid.* s. 29, 30. But in both these cases I presume it is necessary for the party, who may contest the probate of the will, or move to set aside the grant of administration, to prove that he hath an INTEREST in the subject of controversy: and, failing to make that appear, he is not such PARTY as will have a right to reverse what the Court hath done, however irregular, or even illegal. The case of *Halcombe v. Purnell* and others (May 6th 1802) in this Court, in which the Court held that a principal obligor in a forthcoming bond, against whom the judgment in the original suit was rendered, but against whom no judgment was rendered on the forthcoming bond, was not entitled to appeal from a judgment against the surety in the forthcoming bond, is even a stronger case than that of

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Dunlap v. the Commonwealth (2 Call, 284) in which the Court decided that an *Amicus Curiæ* cannot appeal. For in *Halcombe's* case it must have appeared upon the face of the record that he was *collaterally interested;* since the surety would be entitled to recover the amount of the judgment, obtained against him, of the principal obligor, whenever he should discharge it; but not being *immediately a party* to the judgment, the Court dismissed the appeal. Now, here, Mr. *Grymes* has not shown by the record, to which the writ of supersedeas issued, that he hath any INTEREST in the grant of the administration to *Sayre.* The persons, who, as far as appears by this record, have a right to supersede that grant, are, first, the executors who have not yet renounced; and, secondly, the widow of Mr. *Grymes*, if she have not concluded herself by her implied assent in becoming the surety of Mr. *Sayre* in the administration bond.

I am therefore of opinion that the judgment be reversed, and the writ of supersedeas quashed, as having been improvidently awarded.

Judge ROANE:—

It was not competent for the District Court to reverse the judgment of the County Court unless the party praying the supersedeas had an interest in the controversy. A mere volunteer or *amicus curiæ* has not the liberty of appealing. This has often been decided here. The supersedeas in this instance only goes to the order of *Middlesex* County Court granting the administration to *Sayre.* Even the petition does not expressly apply to the order of the Court admitting the will to probate, though it refers to the proceedings at that time, as it were, *arguendo.* The only record to which the petition refers as annexed to and made the foundation thereof is that containing the grant of administration to *Sayre.* The former judgment of the Court has never been appealed from by him, and taking that judgment to be right, *Grymes* is not named as an executor in the will. If the supersedeas in the present instance had also been pointed against that judgment, this Court must have taken the whole case into consideration, and then, possibly, he might have obviated the objection which now precludes him from contesting the judgment.

He may even yet do it by a proceeding to reverse the judgment of June, admitting the will to probate with the memorandum, and if by such reversal he can establish

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himself to be an executor *named* in the will he may hereafter perhaps avail himself of that character to vacate the grant of adminstration to *Sayre*.

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On the single ground, therefore, of the want of interest in *Grymes*, I am of opinion that the supersedeas issued improvidently, and that the order of the County Court be affirmed.

Judge FLEMING. The counsel for the appellant in this case, has stated two points on which he relies to show that the judgment of the District Court is erroneous.

1st, That the supersedeas was improvidently awarded, and ought to have been quashed, as *Philip Grymes* was no party to the order appointing an administrator, and not even concerned in interest.

2dly, That if he were a proper party, the appointment of *Mr. Sayre* as administrator, without full service of the summons, was but an irregularity, that might have been corrected in the County Court.

With respect to the first point, it appears by the record that *Philip Grymes* (who had been named an executor in the will, and whose name had been obliterated by order of the testator,) at the time the will was admitted to record moved the Court to suppress the evidence introduced to prove the same, as irregular and incompetent, until a summons had issued to all the parties having any interest under the will, and the trustees therein named, to require of them to show cause if any they could, why the will should not be proven without regard to the obliteration aforesaid, and he the said *Grymes* permitted to take out letters testamentary of the estate of the testator, which summons was denied by the Court; to which opinion *Grymes* filed his exceptions; and whether they were sustainable or not seems immaterial to be considered here, as they are sufficient in my conception to constitute him a proper party, as the granting letters of administration to *Sayre* was adverse to a right he was contending for, and especially as the substance of those exceptions is stated in the petition for a supersedeas.

As to the second point, "that if he was a proper party "the appointment of *Mr. Sayre* as administrator, without "full service of the summons, was but an irregularity, "that might have been corrected in the County Court:" the irregularity (to give it no harsher name) was in direct violation of the law; and whatever the power of the County Court may have been, it showed no disposition

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to correct the errour; and the object of the supersedeas was to *compel* that Court to do so, and was in my opinion properly awarded.

We have no occasion, I think, to resort to the English laws respecting administrations and testamentary controversies: our own statutes being explicit, and fully competent to the subject.

I am of opinion that the jndgment of the District Court, reversing the order of *Middlesex* County Court, is correct, and ought to be affirmed. But as a majority of the Court is of a different opinion, the judgment is to be reversed.

REGULA GENERALIS.—*Thursday, July 9th*, 1807.

The Court, in the case of *Whiting v. Daniel* and others, declared that in chancery causes it was unnecessary to read the record in the opening of the case; but that the counsel on both sides might state what they considered as proved by any deposition on which they relied, leaving it to the Court to inspect the record and decide whether the fact be made out by such deposition. And in future that should be the rule.

REGULA GENERALIS.—*Friday, July 10th*, 1807.

After the end of this present term, it will be expected that the Judges of this Court, respectively, shall be presented with the statement directed by the rule of this Court made the 15th day of May 1804, within the four first days of each term; and no cause intended to be argued by counsel in which such statement is not presented accordingly shall be argued by them in the same term in which the statement may be thereafter presented, unless for some very special reason to the contrary appearing to the Court.

REGULA GENERALIS.—*Saturday, July 11th*, 1807.

In future no motion shall be permitted to be made, in any case not already before the Court, on the last day of the term, unless some very special reason appearing to the Court be assigned for hearing such motion.

SMITH & MAXWELL, PRINTERS.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA

IN THE THIRTY-SECOND YEAR OF THE COMMONWEALTH.

PETER LYONS, *Esquire, President,*
WILLIAM FLEMING, *Esquire,*
SPENCER ROANE, *Esquire,*
ST. GEORGE TUCKER, *Esquire,* } Judges.

PHILIP NORBORNE NICHOLAS, *Esquire, Attorney General.*

BILLY COOPER *and* JESSE COOPER
against
ROBERT H. SAUNDERS *and* CHARLES HOPKINS.

Tuesday, October 6th.

THIS was an appeal from the judgment of the District Court of Richmond, reversing an order of Goochland County Court.

The following were the proceedings in the County Court.

On Monday, the 20th of April, 1801, the court directed the overseers of the poor of their county to send to the city of Richmond for *Billy* and *Jesse Cooper*, two free boys of colour, who had been by them bound to *Samuel Couch*, late of the said county, deceased, and were stated to be then in the possession of *Ann Couch*, his widow.—On the 15th of June, 1801, it was ordered that the said boys be bound; the said *Jesse* to *Charles Hopkins*, and *Billy* to *Robert Hyde Saunders*. At a court held July 20th, 1801, a rule was made against *Saunders* and *Hopkins*, to show cause at the ensuing court, why the order directing the said boys to be bound to them should not be rescinded.—At August Term, the court directed the said order to be rescinded, and the indentures of appreticeship to be cancelled, "because the said *Billy* and *Jesse* had been re-"moved out of the said county more than twelve months "before the time of making the order for binding them to

No *appeal* lies from an order of a County or Corporation Court for binding out an apprentice, or for rescinding his indentures.

It *seems* that, in such case, a Writ of *Certiorari* lies from the *General* Court, to bring up the Record, and correct the proceedings.—

Quere. If an

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"the said *Saunders* and *Hopkins*;"—whereupon the said *Saunders* and *Hopkins* appealed.

The District Court decided, that the order made the 18th of August was erroneous; being of opinion "that the "power of the said County Court to order the said ap- "pellees to be bound as aforesaid was not taken away by "their removal from the county of Goochland."

From this judgment an appeal was taken to this court.

apprentice is removed out of the county or corporation in which he was bound, can the court thereof direct the overseers of their poor to send for and bind him to another master?

The record stated (although *Billy* and *Jesse* were under the age of twenty-one years, and no assignment of counsel to them as *paupers* was mentioned) that they appeared in the County Court *by counsel*, and that they prayed the appeal from the District Court *by their attorney*.

The *Attorney General* for the appellants contended, that the law did not allow the appeal from the County Court; and that, if it did, the order of the 18th of August was right, and ought not to have been reversed.

In support of the first position, he inferred from the language of the law giving jurisdiction to the County Courts on the subject of apprentices,(*a*) that such jurisdiction was intended to be final. He observed that appeals are mere creatures of the legislature and not demandable of common right; that, therefore, an express Act of Assembly is necessary to authorize an appeal; and that none such existed in the present case; the provision, concerning appeals to the Court of Appeals,(*b*) merely referring to that, on the subject of appeals from the County to the District Courts;(*c*) and the latter saying nothing about *apprentices*. It allows, indeed, an appeal on behalf of any persons "thinking themselves aggrieved "by the judgment or sentence of a County Court, in any "action, suit, or contest whatsoever, where the debt or "damages, or other thing recovered or claimed in such "suit, exclusive of the costs, shall be of the value of one "hundred dollars," &c. But the reference to the value of the thing in controversy precludes its application to *this case*, in which the contest is not about a thing the value of which can be estimated.

Also *Quere*, Whether an apprentice so removed to a county or corporation, obtains a *legal settlement* therein by remaining there twelve months during his apprenticeship?

In maintaining the second point, he insisted that the County Court of Goochland had no right to direct the overseers of the poor to send for those orphans to the County of Henrico, which was out of the limits of their jurisdiction; that, having resided more than twelve months in Henrico, they had gained a legal settlement there,(*d*) and could not be removed to Goochland, by order of the court of that county, without their consent, though they

(*a*) Rev. Code, 1 vol. p. 174, ch. 95, sect. 15.
(*b*) Rev. Code, 1 vol. p. 62, ch. 63, sect. 14.
(*c*) Rev. Code, 1 vol. p. 82, ch. 66, sect. 53.
(*d*) Rev. Code, 1 vol. p. 186, ch. 102, sect. 38.

might have returned thither of their own accord; that proceedings of this sort being summary, and out of the ordinary course of the common law, the court should have spread on the record such facts and statements as were necessary to show that they had acted regularly; and that nothing appeared on the record to authorize the orders of the 20th of April and 15th of June;—that, therefore, the court had acted correctly in rescinding those orders by that of the 18th of August.*

It is true, that *as a judicial tribunal*, a county court, at a subsequent term, cannot rescind its own order, except by a writ of errour *coram nobis;* but county courts are not only *judicial* bodies but bodies of *police*, and, as such, have extensive powers. In certain cases they have legislative authority, and are fully empowered to superintend all matters relative to the poor, and to *apprentices:*(e) even to rescind their indentures, and transfer them to other masters.

(e) Rev. Code, 1 vol. p. 174, ch. 95, sect. 15.

He moreover observed, that, if the District Court had been right in reversing the order of the 18th of August, it should also have reversed the two preceding orders, and remanded the case for new proceedings therein; because, if several orders are erroneous, the court ought not to stop at the last, but to reverse the whole of them.

Warden, for the appellee. *Charles Hopkins* observed, that *Robert H. Saunders* was said to have consented that the indenture whereby *Billy Cooper* was bound to him, should be vacated; but as a friend to justice, submitted it to the consideration of the court, whether *Saunders* was not still bound to perform the covenants made on his part in the indenture.

He contended, 1, that the indentures which bound the orphans to *Samuel Couch* became void by his death, and did not enure to his representatives; 2, that, when *Anne Couch*, his sole representative, removed them from Goochland to the city of Richmond, her act, in so doing, was tortious; 3, that the obligation of the County Court of Goochland to provide for their maintenance and education, continued after that removal, and justified it in reclaiming them, and binding them out, under its order, of the 15th day of June, 1801; and 4, that its order

* Judge TUCKER, in the course of the argument, observed, that the order of the 20th of July (which led to that of the 18th of August) was also irregular, as no person was stated on whose motion it was made. The apprentices ought to have been personally before the court.

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of the 18th of August was erroneous, and that of the District Court, reversing the same, was correct.

He denied, that the County Court could rescind the act of the overseers of the poor, or destroy the indentures; and asked if *Saunders & Hopkins* had not an exclusive right to the services of these orphans, according to the indentures? He said, the order by which they were bound to them, was for the *benefit* of the orphans, and the court, by rescinding it, acted for their *destruction*.—Admitting that order to have been erroneous, the court ought not, because itself had done wrong, to have injured *them* by destroying covenants made for their advantage. He said too, that as *Billy* and *Jesse Cooper* were infants, it was impossible, under the circumstances of this case, that counsel could have been heard on their behalf. Mrs. *Anne Couch* was the person, on whose behalf the motion was actually made, and who had now taken the appeal from the District Court. By affirming the judgment of that court, a benefit will be conferred on those who are *called* appellants.

With respect to the right of appeal, from the County Court, he insisted, that the County Court had no exclusive jurisdiction, where *the rights of persons* are affected; except where their decision is to be *final*, by some express law. Are not *the rights of persons* affected here? Is not the master *aggrieved* by the order of the court rescinding its former order? and if aggrieved, has he not a right to appeal? Shall a man have a right to appeal because he might lose thirty pounds, and shall he not have it, when his *apprentice* is taken from him, by whose services he might get a hundred?

Besides, if there was no right of appeal to the District Court, the present appellants had no right to appeal to *this* court; for *this court* has no more jurisdiction on this subject, than the *District Court* has.

The *Attorney General*, in reply.

Mr. *Warden* has gone into a great deal of secret history of this case. I shall not follow his example. I admit it does not appear at whose motion *any* of the orders were made; but this objection applies as much *in favour* of the appellants as *against* them.

As to the removal of the apprentices to Henrico, he cannot contend, that a man is to be stationary because he has taken an apprentice. There is nothing in the law to

compel him to remain *in the county*. The objection to the order of the 18th of August, on the ground of injury to the orphans, is equally unsupported. It does not appear that either *Saunders* or *Hopkins* could teach them a trade. If we *are* to travel out of the record, *Saunders* is a man of large fortune and no tradesman. But that the judgment is a *bad one* is no argument to prove *the right of appeal*. We are asked by Mr. *Warden*, "shall a man have an appeal when the sum in controversy is only thirty pounds, and shall he not have it in this case?" This is an argument which ought to be addressed to the legislature, not to the court. It would prove, that even in criminal cases, there ought to be an appeal.

But our having appealed is urged against us. We appealed *not from the County Court*, but the District Court; and this on the ground that the latter had assumed a jurisdiction to which it was not entitled.

The Revd. Code, 1 vol. p. 173, ch. 95, sect. 11, which directs an orphan to be bound as an apprentice, "by order of the court of the county or corporation *in which he or she resides*," is decisive to show that the County Court of Goochland had no right to send for the appellants from the city of Richmond for the purpose of binding them out; especially as their residence therein for twelve months had gained them *a legal settlement*, according the Revd. Code, p. 186, ch. 102, sect. 35.

Judge TUCKER.—The provision in that clause of the law is merely *negative*;—"that no person shall be accounted an inhabitant, so as to have gained a legal settlement, "until such person shall have been actually resident in the "county, wherein *he shall claim* a legal settlement, for the "space of one whole year."

Warden. The "*county where a person resides*" signifies the county where by birth or education he *most commonly* has resided. The orphans here were not brought to Henrico with their own consent.

A person may *gain* a settlement by residence for twelve months; but, where brought into a county *without his own consent*, and so *retained* there, he cannot be considered as *settled*. The Justices of Henrico could not have considered *themselves* required to act upon the case, as these orphans were maintained in the family of Mrs. *Couch*, and their right to freedom was unknown to *them*.

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Wednesday, October 7th.

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Mr. Warden, at the request of the court, spoke more particularly to the point, whether an appeal could be taken from the order of the County Court;—but previously observed, (on the other points in the cause,) that the removal of the orphans from Goochland was compulsory and illegal; that the record stated, they had *been* removed, not that "they *had removed themselves;*" that the law directing the indentures of apprentices to be lodged with the clerk of the court by whose order they are bound, (*f*) shows that they ought not to be removed from the county; that, therefore, the Court of Goochland County had a right to send for and bind them out again.

(*f*) Revd. Code, 1 vol. p. 173, ch. 95, sect. 11.

On the question concerning the right of appeal, he argued from the words of the Act establishing the General Court, (*g*) that the jurisdiction of that court originally was general over all controversies at common law which were brought before it by *any legal means;* and contended, that when the powers of the General Court were distributed, the same extensive jurisdiction was given to the District Courts within the limits of their several districts.(*h*)

(*g*) Sessions Acts Oct. 1777, ch. 17, sect. 2.

The omission to mention the case of apprentices in the several laws allowing appeals is no argument against the right of appeal. Suppose a person who had been engaged to build a bridge or a court-house had brought his timber to the place, and the court were then to rescind the order for building the bridge or court-house, would there be no remedy by appeal?—Yet bridges and court-houses are not mentioned in any of those laws.

(*h*) Revd. Code, 1 vol. p. 74, ch. 66, sect 6, and *Ib.* p. 92, ch. 67, sect. 65—and *Ib.* p. 82, ch. 66, sect. 53.

He contended that restraining the right of appeal, where a man has sustained an injury even for a penny is not correct; and mentioned the case in England of a dispute concerning the copyright of Thomson's Seasons, where the damages were only forty shillings, yet an appeal was allowed, though, perhaps, there was no law in that country mentioning such a case.

He cited the law concerning the Court of Appeals (*i*) to show that the right of appeal from the District Courts to this court was to be exercised in the same manner as from the county to the District Courts; and insisted that, in both cases, an appeal was to be allowed wherever an injury had been sustained; that, in this case, *freedom* was in question; a *contract* had been entered into, which was obligatory on both parties, and yet had been rescinded by the County Court.—In speaking of the right of appeal, the several laws used the *potential* article "*may*," but no *ne-*

(*i*) Revd. Code, p. 62. ch 63, sect. 14.

gative words;—from which he inferred that, in all cases coming within the like reason, though not expressly mentioned, appeals ought to be allowed; for it would be abhorrent to every principle of liberty to establish an inferiour court as a court of supreme and absolute jurisdiction over the rights of the citizens.

Curia advisare vult.

Friday, October 16th. The Judges delivered their opinions.

Judge TUCKER, after stating the case, made the following observations: The right of *appealing* from the judgment or proceedings of a court of record, being unknown to the common law, must depend upon the statutes which allow it in certain cases.

The appellate jurisdiction of the District Courts is thus limited by the law of Virginia, 1794, ch. 66, sect. 53, [Revd. Code, I Vol. p. 82.] "Where any person or persons, body politick or corporate, shall think themselves "aggrieved by the judgment or sentence of any County "Court, or Court of Hustings, in any action, suit, or "contest whatsoever, where the debt or damages, or "other thing recovered or claimed in such suit, exclusive "of the costs, shall be of the value of $100 or 3000 pounds "of tobacco, or upwards, or where the title or bounds of "lands shall be drawn in question, or the contest shall be "concerning mills, roads, the probate of wills, or certifi-"cates for obtaining administration, such person, &c. may "enter an appeal to the next District Court."

It requires but slender talents, or discernment, to discover that orders for binding out apprentices, or for rescinding their indentures are not comprehended in this clause; nor has any other statute been pointed out which supplies the omission.

An *appeal* from the order of the County Court, therefore, did not lie in this case; and since it did not, the District Court could not obtain jurisdiction of the case *in this mode*, any more than it could obtain jurisdiction in the case of *an appeal* from a judgment at common law, where the debt or damages might be under $100; although it might, without question, obtain jurisdiction in such a case, by a writ of errour, or of supersedeas, if the debt or damages should exceed $33 33 cents.

Mr. *Warden*, however, complains heavily of the doctrine. that no remedy can be had against the erroneous or

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even arbitrary proceedings of a County Court in cases of this nature. But, I apprehend, it *does not* necessarily follow that such proceedings *cannot be reexamined or reversed* in a superiour court, because the Legislature have not granted an *appeal*.—A writ of *certiorari* lies *at common law* to examine and affirm or reverse proceedings and JUDGMENTS in inferiour courts: and, for the purposes of removing not only *legal* but likewise equitable proceedings, it lies from the High Court of Chancery in England. It also lies from the Court of King's Bench in England to ALL inferiour courts unless EXPRESSLY EXEMPTED by the words of a statute. See *Gwyllim's* Bac. Abr. 559, 561.—2 *Burrow*, 1041, and 1 Ld. *Raym.* 580.—I have always supposed that the General Court, as originally constituted (Oct. 1777, ch. 17.) in conformity with the apparent intention of the Constitution, possessed every power, jurisdiction, and authority, that a court of common law could possess, except in original suits of less value than ten pounds, and appeals under the same amount. The clause defining its jurisdiction is as comprehensive as words can make it.—It declares that, "it shall be general over all persons, *and in all causes, matters, and things* at common law, whether brought before them by original process, by appeal from any inferiour court, *habeas corpus*, *certiorari*, writ of errour, *supersedeas*, *mandamus*, or by any other legal ways and means."—Then follows a *proviso*, that no person shall sue out original process from the trial of any matter or thing in the General Court, of *less* value than ten pounds, except in certain enumerated cases, on penalty of being *nonsuited*, and having his suit dismissed with costs.—In inquiring into its powers we are to look into the proviso, for an *exception* to them; and, if we find no *exception*, there can be no doubt of the power, unless it can be expressly taken away or limited by some other clause.—If these general powers be not transferred to the District Courts, within their respective districts, they must still remain with the General Court, under the third section of the Act of 1792; (Ed. of 1794, ch. 65.) for it certainly was not the intention of the Legislature to extinguish them altogether. If this opinion be correct, a remedy still lies open to persons aggrieved in cases of this sort, though not by *appeal:* but whether it ought to be pursued in the General Court, or in the District Court, is a point upon which I mean not to offer an opinion.—I have merely thrown out these hints by way of answer to the complaints of the counsel employed on behalf of the gentlemen who conceive them-

selves aggrieved by the proceedings of the County Court. But have this court the power to correct the error of the District Court in sustaining its jurisdiction over the cause, when brought before them in this unauthorized and illegal manner? This must depend upon the statute which constitutes this court, and describes and limits its jurisdiction. (L. V. 1794, c. 63.)

The 14th section of that act declares that "appeals, "writs of error, and supersedeas, may be granted, heard "and determined by the Court of Appeals to and from "any final decree or judgment of the High Court of Chancery, General Court, and District Courts, in the same "manner and ON THE SAME PRINCIPLES, as appeals, writs "of error and supersedeas, are to be granted, heard, and "determined by the High Court of Chancery, and DISTRICT COURTS to and from any final judgment or decree of a county, city, or borough court."

What is meant by this declaration, that appeals to this court from the District Courts shall be granted ON THE SAME PRINCIPLES as appeals to THOSE COURTS may be granted from the *county courts?* I understand it as referring us to the Act which grants *appeals* from those courts, *for the several cases*, in which *appeals* may be granted to this court. And if we do not find that an *appeal* in any given case does lie from the *County Court* to the *District Court*, neither can an *appeal* lie from thence to this court.

Let us suppose a judgment at common law rendered against a man in a County Court for a debt of $99, exclusive of costs, and that that court should allow an appeal to the District Court, and, upon the affirmance thereof in that court, the defendant were to appeal to this court—Could this court take cognizance of the case? I apprehend not—for the jurisdiction of this court in such a case is expressly limited to judgments to the amount of $100, exclusive of costs. What then must this court do? Shall it *assume* jurisdiction itself, for the purpose of correcting the error of the District Court in *assuming* jurisdiction where it hath none? or shall the appeal be dismissed for want of jurisdiction? The latter course was adopted in the case of *Hepburn v. Lewis*, 2 *Call* 498. Although the damages laid in the plaintiff's declaration were £50, yet as he obtained a verdict for less than £30, from the judgment on which he *appealed*, this court declared his appeal ought not to have been allowed, and *dismissed* it. So, in the case of *Bedinger v. the Commonwealth*, (3 Call 461) and several subsequent cases of a similar nature, the Court

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dismissed the appeals, because it had not jurisdiction.—Now, if the District Court had not jurisdiction upon an appeal in this case, and if appeals from the District Courts are to be granted upon the same principles as from the County Courts, how can this Court have jurisdiction? For, the foundation failing, the superstructure, I apprehend, must do so. Suppose this had been a criminal prosecution in the County Court, and a fine of $100 had been assessed, and, upon an appeal to the District Court, the judgment had been affirmed; could this Court have done more than *dismiss* the appeal, (as in *Bedinger's* case,) if the District Court had allowed one to be entered? I apprehend not; and I cannot distinguish between the PRINCIPLE in the case supposed, and that now before us.

Being of opinion that we have no jurisdiction of this case, I decline entering into the merits of it, and only give my opinion that the appeal should be *dismissed.*

Judge Fleming. The County and Corporation Courts, having exclusive jurisdiction, in the first instance, respecting the care of, and binding out, poor orphans, and of hearing complaints between apprentices and their masters and mistresses, have power to vary and rescind their orders, with respect to them from time to time, at their discretion, as circumstances may require; and no appeal lies from any order made by such courts on those subjects: and any person, thinking him or herself aggrieved by such order, may pursue another mode of redress, as pointed out by the Judge who preceded me. The County Court of Goochland therefore erred in allowing an *appeal* from their order of the 18th of August 1801; and there is error in the District Court, in taking *cognizance* of the case, which that Court ought to have dismissed for want of jurisdiction. I am therefore of opinion (without considering the merits of the case) that the judgment of the District Court ought to be reversed. If, instead of reversing the judgment, this appeal should now be dismissed, the order of Goochland Court, of the 18th of August 1801, would remain reversed by the judgment of a court that had no jurisdiction of the case.

The case of *Bedinger* and others *v. the Commonwealth*, has been mentioned as similar to the one now before us; but to me they appear essentially different. That was a criminal prosecution for bribery and corruption in the District Court of Winchester, in which there was a judgment against the defendants, who appealed to this court,

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which, for want of jurisdiction, dismissed the appeal, without inquiring into the merits of the case; leaving in force the judgment rendered by a court that had competent and *final* jurisdiction of the cause.

Judge LYONS concurred with Judge FLEMING;—Judge ROANE (whose absence was occasioned by indisposition) not sitting in the cause.

The opinion of the court was therefore entered as follows:

"That the judgment of the District Court was erroneous "in this, that it belongs by law to the county, city, and "borough courts of this state, exclusively, to make orders "for binding out poor orphans as apprentices, and to hear "and determine in a summary way all complaints of ap- "prentices against their masters, and to make orders for "removing them when it shall seem necessary; from "which orders no appeal lies; and therefore the County "Court of Goochland ought not to have allowed, nor the "District Court of Richmond received the appeal granted "in this cause."

Judgment reversed, and appeal to the District Court from the order of Goochland County Court of the 18th of August 1801, directed to be dismissed.

SHELTON *against* POLLOCK & Co.

Thursday, October 8th. In an action of debt, the declaration being against A. and B. merchants and partners, and charging that A. for himself and B. by his certain bill penal bound *himself* and *his heirs*, &c. (the bill penal being in that form,) without con-

Robert Pollock & *Co.* brought an action of debt in the District Court of Charlottesville against *William Walker* and *Clifton Garland*, late merchants and partners, under the firm of *Walker & Garland*, on a bill penal, in the following words: "On demand I promise to pay *Robert Pol-* "*lock & Co.* two hundred and ten pounds, seventeen shil- "lings and seven pence Virginia currency, for the true "payment whereof I bind *myself*, *my heirs*, *executors and* "*assigns* in the penal sum of four hundred and twenty-one "pounds, fifteen shillings and two pence, like money. "Witness my hand and seal this second day of Septem- "ber, 1802.

* * * *
William Walker, * Seal. *
for * * * *
Walker & Garland."

Attest *James P. Garland.*

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The writ was returned by the sheriff with this endorsement, "Executed, and Samuel Shelton bail;" but the clerk certified at the foot of the record *that no bail-bond was returned with the writ.*

The declaration was against *William Walker* and *Clifton Garland*, late merchants and partners, under the firm of *Walker & Garland;* and charged that *William Walker* for *Walker & Garland* bound *himself*, &c. (according to the terms of the bill penal) and that neither the said *Walker & Garland* nor either of them had paid, &c.

At rules in the clerk's office in April 1804, the suit abated as to the defendant *Walker* by his death: and the record proceeds to state that, "the sheriff having returned that he had *duly executed* the writ" a common order was entered against the defendant *Garland* and *Samuel Shelton* the bail for his appearance, which was confirmed at the rules in May following, and a final judgment entered.

Samuel Shelton, the appearance bail, obtained a supersedeas to this judgment, from one of the Judges of this court;—alledging, in his petition, "that he never was bail "in the suit; that he never entered into a bail-bond; nor "ever, in the most distant manner, authorized the sheriff "to consider him as bail."—

Nicholas, for the plaintiff in error, contended, 1, that the bill penal appearing on the record to have been signed by *William Walker* "for *Walker & Garland*," and not by *both the partners*, they could not both be bound; and cited *Gwyllim's* Edition of *Bacon's* Abridgment, (Title *Merchants* and *Merchandize*) to show that one partner cannot bind another by signing a bond. (*a*) He observed that this case presented the doctrine in a very strong point of view; for the suit had abated as to *Walker*, (who signed the obligation,) and judgment had been obtained against *Garland*, (who had never signed it,) and his bail.

2. Judgment was not properly entered against *Shelton* as bail, no bail-bond, nor copy thereof, having been returned.

The Revised Code (1 vol. p. 78, ch. 66, sect. 26.) requires a copy of the bail-bond to be returned by the sheriff, together with the writ.—The motive of the Legislature was to guard against fraud;—that a record of the bail's responsibility should be filed:—otherwise the sheriff might, by collusion with the plaintiff, make a man bail who was not.—In this case, a man who was ignorant that he had ever been considered as bail, has had a judgment entered against him.

taining any farther averments, was adjudged to be insufficient in law to maintain the action.

If the sheriff returns a writ executed, and the *name* of the appearance bail, but does not return the bail-bond, or a copy thereof, to the clerk's office, together with the writ, judgment ought not to be entered against the defendant and *bail*, but against the defendant and the *sheriff*.

It *seems* that, where a judgment is entered in the clerk's office against the defendant and bail, a copy of the bail-bond ought to be inserted in the record.

(*a*) See *Harrison v. Jackson*, 7 Term. Rep. 207.

Where an *office*-judgment is rendered, the bail-bond is an essential part of the record, and ought to be inserted by the clerk.—This judgment is, therefore, erroneous, because it does not legally appear that *Shelton* ever was bail.

It may be said, that this objection is *dehors* the record: but surely it is not.—When we apply for a supersedeas, we have a right to insist on the production of every thing upon which the clerk founded his judgment.

The judges of the District Court could not have corrected the error; it being too late, after the judgment entered in the office had been confirmed, and a term had elapsed; (*b*) the District Court having power to correct such proceedings in the clerk's office as took place *during the preceding vacation only*. (*c*)—Relief must, therefore, be obtained from this court alone.

(*b*) *Halley* v. *Beard*, &c. *ante* p. 25.

(*c*) Revised Code, 1 vol. p. 78, ch. 66, sect. 28.

Call, for the defendant in error. The first objection is, that one partner cannot make himself liable for another. But, in this country, the course of trade is very different. The custom here is, that the planter sells his tobacco to the merchant; the merchant is his banker; and the mercantile company is responsible. The planter wishes a bond from the company. Where only one of the company resides here, and the rest on the other side of the Atlantick, one only can sign the bond. The course of trade, therefore, is, that one partner may bind the rest. If the law of England was positive against it, the law would be different here, for the case of *Rose* v. *Murchie*, 2 *Call* 409, proves that the course of trade alters the rules of law.

I do not say that one partner can, for *land* bought by him, bind the rest. Why?—Because such a purchase is not in the course of trade. But, if he buys a hogshead of tobacco, the case is otherwise. If a partner gives a bond not in the course of trade, the other partners may object to it; but he who makes the objection must support it.

The second question is concerning the responsibility of *Shelton* as bail.

On this point it is to be observed, that the return of the bail-bond is not the foundation of the judgment. His responsibility accrued from his becoming bail, and the sheriff's return that he was so; and his signing the bond was sufficient, whether the sheriff returned it or not. The sheriff's returning a copy is not for the benefit of the bail, but of the *plaintiff*, that he may inspect it, and see whether the bond was legally taken, so as to bind the bail. The plaintiff has his choice, either to proceed against the bail

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without the copy, or against the sheriff for failing to return it.

Take the record, *without the clerk's certificate*, and all is regular. If, therefore, the certificate contradicts the record, it is not admissible; for *Shelton* has not a right to aver anything contrary to it, and the clerk cannot be permitted by his certificate to impeach his own record.

But, the certificate is that, "no *bail-bond* was returned;" not that no *copy* of the bail-bond was returned. A *copy*, therefore, *might* have been returned; and every inference in favour of a judgment is to be made by the Court of Error.

If, however, *Shelton* is an injured man, he must look to the sheriff for redress, and sue him for his false return; but, I suppose, the fact is, that the sheriff, at this moment, has the bond in his pocket.

Nicholas, in reply.

Mr. *Call* contends, that the course of trade will control the principles of law; but the case of *Rose v. Murchie* does not go that length. *Chitty*, on Bills of Exchange, shows that, in England, the usage of merchants could not put promissory notes on the same footing with inland bills of exchange, until the statute of *Anne* was passed.

I doubt, however, whether there has been any such course of trade. The planters have been generally indebted to the British merchants; not *e contra*. But, at any rate, the reason as to foreign merchants does not apply in this case; for both the obligors resided in the county of Albemarle.

The bond was only a personal undertaking *by Walker, for Walker & Garland;* not a bond of *Walker & Garland.* Neither the bond nor the declaration states *them* to have bound *themselves* by means of *Walker* one of the partners: but *he* binds *himself* to pay. The burthen of proof lies on the plaintiff to show that the bond was given in consequence of a partnership transaction, and in the course of trade; it being, *prima facie*, a personal undertaking.

As to the 2d point—This record ought not to be considered as in ordinary cases. The proceedings having not been in court, but altogether in the *clerk's* office, all the documents which he acted upon ought to have been inserted in the record.

I do not say the *return* of the copy of the bail-bond binds the bail; but I say, his *giving* the bond binds him, and the clerk has no evidence, but the copy's being re-

turned, which can justify him in saying there is an original.

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If the sheriff does not return a copy of the bail-bond, he is to be considered as the bail himself, and may defend the suit.(*d*) The judgment was, of course, erroneous, because the clerk ought to have entered it against the defendant and sheriff; not against the defendant and bail; and such is the constant practice in such cases.

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(*d*) Revd. Code, p. 78, ch. 66, sect. 27.

Wednesday, Oct. 14th. The President delivered the opinion of the court consisting of all the Judges, "that "there was error in this; that the declaration was not "sufficient in law to maintain the action against *Walker* "& *Garland* jointly, on a bond, as stated in the declara- "tion, in the singular number and binding on *Walker* "only, and also in this; that the sheriff not having re- "turned the bail-bond given by the appellant (if any bond "was by him given) for the appearance of *Clifton Garland*, "or a copy thereof, to the clerk's office before the day for "the appearance of the said *Garland* in the said office to "the suit of *Pollock & Co.* according to law, judgment "ought not to have been entered against the appellant as "bail for the appearance of the said *Garland*, but against "the *sheriff* for not returning the bail-bond, or a copy "thereof, according to law."

A question was raised by Mr. *Call* whether the suit should not be sent back for farther proceedings. He contended that by amending the declaration and averring that the bond was given by *Walker* for himself and *Garland, with Garland's consent*, the plaintiff might recover. The court gave no opinion on this point; but observed that, where the declaration was defective, it was the constant practice of this court to reverse the judgment altogether, and not to direct a repleader.(*e*)

(*e*) *Smith v. Walker*, 1 Wash. 135.

The judgment was therefore reversed *in toto*.

GATHRIGHT *against* MARSHALL, *Executor of* RIND.

Wednesday, Oct. 14th.

The only question in this case was, whether in the course of administering the assets of the decedent, who was a *lawyer*, a debt due from him to his *client*, for money collected upon a *judgment*, but of which collection no writ-

A debt due from an attorney to his client, for

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ten acknowledgment appeared, was to be considered as standing on the footing of an open account only, or as being of equal dignity with a judgment or specialty.

The District Court of Richmond decided the debt to be of the same dignity with other open accounts, and gave a judgment in favour of *Gathright*, payable when assets should come into the hands of the defendant to be administered; from which judgment *Gathright* appealed.

money collected on a judgment, is only a debt by simple contract.

Nicholas for the appellant observed, that the principles which regulate the order of payment of a decedent's debts are derived from the common law; that certain debts though not secured by writings were preferred to specialties on account of peculiar reasons and circumstances; funeral expenses, for example; that, according to the reason of the case, no debt can stand on a higher footing than that of an attorney to his client; that in this case, the claim was founded on a judgment;—the records were to be resorted to for its establishment, and the Act of Assembly gave a summary recovery by *motion*.(*a*)

(*a*) Revd. Code, 1 vol. p. 97, ch. 71, sect. 7.
(*b*) 2 Call, 188.

In the case of *Eppes* and others *v. Randolph*(*b*) certain simple contract creditors were, for special reasons, put on the footing of bond creditors.

Judge LYONS. Was not that in a Court of *Equity?*

Nicholas. The same rule as to dignity of debts applies in both courts—The peculiar remedy by motion by virtue of the Act of Assembly furnishes another reason for considering this claim as superior to an ordinary simple contract. The doctrine is laid down in 4 Bac. Abr. (Gwyllim's ed.) 471, 472, that, where a particular remedy is given by statute, it is considered as proceeding on a record, because the statute is a record of the highest dignity. In certain cases too the court regards a simple contract debt as due by record, in order to take it out of the Act of Limitations. They may, therefore, by parity of reasoning, regard it as such, in order to affect its dignity in the order of payment, where it would be equitable to do so.

Randolph, for the appellee, thought the point too plain against the appellant to require an argument.

Thursday, Oct. 15th—The judgment of the District Court was unanimously affirmed; all the Judges being present.

CRINGAN & ATCHESON *against* NICHOLSON'S *Executors.* OCTOBER, 1807.

Friday, October 16th.

A contract under seal decreed, at the instance of one of the parties, to be set aside, as having been vacated and abandoned; the other (at whose request, and for whose accommodation, it was expressly made) having for a long time neglected to carry it into effect, and shown by particular Acts (though without any acknowledgment under seal) that he considered it as being no longer in force.

John Cringan and *William Atcheson* filed their bill in the late High Court of Chancery, stating that they were co-partners with *George Nicholson* in a rope-walk, the scite of which was purchased in the year 1791, by the said *Nicholson*, for and on behalf of the company, of *William Mayo;* but the deed for the same was taken by him to *himself only;* that the said *Nicholson*, being the acting partner who managed the business, and wishing to live near the rope-walk, proposed to them to let him have a small slip of the land, *viz.* 2 3–4 acres, for his *residence;* to which they assented, and signed an agreement to that effect, *as they chose him* to reside near the scene of business; that, nevertheless, he never built or resided thereon, but purchased at another place, and all parties considered the agreement for the 2 3-4 acres at an end, and, therefore, *Nicholson* never had them surveyed and laid off, nor paid or offered to pay the plaintiffs any thing for them, nor charged himself with them in the company's books; but built a house for the company's negroes on them, the expense of which he charged to the company; and, in an estimate afterwards made by him of his private property, this slip of land was not included; nor does he except them when mentioning in his will that the lands of the company stood in his name: that the whole property had been sold by the executors since the death of *Nicholson;* and that they refused to pay to the plaintiffs their proportions of the proceeds of the said 2 3-4 acres.

The plaintiffs therefore prayed to be let into their proportions of the sales, as if the agreement had never existed; that it might be delivered up to be cancelled, as having been vacated and abandoned by all parties; and for general relief, &c.

The written agreement, under the hands and seals of the parties, and bearing date in July 1792, is in the following words: "Whereas *George Nicholson* hath notified "to us his wish to have part of the land, purchased for "the use of the rope-walk company from *William Mayo*, "laid off for the purpose of building a dwelling house, "and that the said land shall be vested in *him* in fee simple, We, *William Atcheson* and *John Cringan* do agree "that the said land be *laid off* in manner following: *viz.* "Beginning, &c. which shall be *valued* agreeable to the "original cost of the whole, which valuation the said *Ni-*

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"*cholson* shall pay to the said rope-walk company." This instrument was attested by *one* witness only.

The defendants in their answers admitted that the land was never *laid off*, nor *valued*, nor *paid for* by *Nicholson*, nor *charged* to him in the company's books; that the *dwelling house* mentioned in the agreement was intended for *Nicholson's* own residence, and that the purport and object of the agreement was that he should reside therein; at least (they say) "*they have no reason to think otherwise;*" that he never built such a house thereon, nor ever resided there, but afterwards purchased a house convenient to the rope-walk, in which house he resided till he went to Madeira in 1802, whence he never returned; that, after the said purchase, he built the brick house mentioned in the bill, as a lodging house for the slaves employed at the rope-walk, the expense of which he charged in the books of the company to the *general account of improvements;*— that he made an estimate of his property in which the lot of 2 3-4 acres is not *particularized*, though he might or might not have intended to comprehend it under the item of "*land and wharfs at Rocket's;*" that there is, also, a clause in his will dated March 12th, 1802, wherein he says, "the legal estate in the lands and tenements *belong-*" *ing to the rope-walk concern* is only in me, although the "before named *John Cringan* and *William Atcheson* are "each entitled to one fifth part." They likewise admitted that, after their testator's death, *viz.* in 1803, the complainants and defendants caused the rope-walk tenement, including the lot in dispute, to be divided into twenty-two lots, and sold the same at publick auction, on credit, in order to enhance the value; and that the lot in question, including the house, sold for about £1300 or £1070, exclusive of the cost of that house; the original cost of the lot, in proportion to the whole, being about £27 10 0 only.

After admitting these facts, they declare that they have no knowledge that their testator ever consented to vacate and annul the agreement; and that neither of them ever saw it until after his death. *Andrew Nicholson* one of the executors states that he was informed of it by him in his lifetime; and that he believed that, after the purchase of the house near the rope-walk, the agreement was considered as vacated; *but he has no foundation* for his belief from anything he ever heard *his testator say on the subject.* *Thomas Nicholson* the other executor says he knows nothing of his testator's ever having consented to vacate the agreement: on the contrary, he has reason

to believe it never was vacated, because he remembers his testator, when about to remove to the house he had purchased, asked him to walk with him to view that part of the rope-walk tenement which he had purchased to build on; and that, a few days before his departure for Madeira, he heard him direct his clerk, *Richardson Taylor*, to set up posts or stones as marks at each corner of the ground.

The deposition of *Richardson Taylor* agrees with the last mentioned allegation, and states that *Nicholson*, the descedent, gave him a memorandum of the bounds in writing, which he mislaid, and therefore did not perform his directions; but that he well recollects their corresponding precisely with the written agreement; that *Nicholson* told him that that part of the ground was his private property, and that he wished the boundary lines fixed, so as to show what part belonged exclusively to himself; that *Nicholson* had repeatedly informed him of the same thing; that, in the year 1801, part of it was sown in clover at his expense; and that he is well convinced, from their frequent conversations, that *Nicholson* did claim and consider that part of the rope-walk tenement as his own.

Call, for the appellants. The agreement was founded on the condition of *Nicholson's* residing on the land which he failed to do. A condition is binding in equity, though not expressed in the writing; it being a fraud on the contracting parties not to perform the condition *intended:* the doctrine is laid down in *Co. Litt.* that if a woman enfeoffs a man with a *view* to a future marriage, and it never takes place, the feoffment is void. But here, one of the expressions in the written articles is, "*for the purpose of building a dwelling house.*" This shows, with sufficient clearness, that such a condition was in fact annexed to the contract. It is also established by the admissions in the answers; the bill charging that the only object was to accommodate *Nicholson* with a residence convenient to the rope-walk, in order that he might pay the more attention to the company's business; and the answers not denying this to be true.

Yet he never built the house, and never went to live on the land:—the contract was, therefore, vacated and abandoned.

That such was *Nicholson's* own idea is proved from all the circumstances of the case.

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CRINGAN & ATCHESON *against* NICHOLSON'S EXECUTORS.

1. Though the contract was in 1792, no survey of the 2 3-4 acres was ever made. It may be objected that he had the *legal* estate in the whole land:—but the boundaries of his *equitable* estate in the 2 3-4 acres ought, nevertheless, to have been ascertained. 2. He never paid any thing for it; never charged himself with it, either in the company's books or his own; but gave a mere *exparte* direction to one of his clerks to go and set up posts, as the bounds of the 2 3-4 acres, which he had no right to do. 3. The agreement was never recorded. 4. Long after this pretended purchase, *Nicholson* builds a tenement to accommodate the labourers in the rope-walk, and builds it on these 2 3-4 acres. This proves that he considered that lot as the property of the company, since he built a house belonging to the company upon it. If the land had been his, the company's house must have been taken down, at the expiration of the partnership, and removed. 5. A week or two before *Nicholson* left this country, he takes an estimate of his property, and does not include this land. It may be said it was comprehended under the words "lands "and wharfs at Rocket's;" but this cannot be; for he rates the value of the lands and wharfs at Rocket's at £1000; yet this lot, exclusive of the wharfs, sold for £1300 and more. 6. There is something particular in the language of his last will and testament. He says "The legal estate in the lands, &c. is only in me, &c." When a man was piously bent upon giving *others* their rights, as he appears to have been when this clause was written, it is inconceivable that he would not have also done *himself* justice, and made the exception in his own favour, if he had considered the 2 3-4 acres as his property.

The answer of *Andrew Nicholson* is important. In his testator's lifetime *he* conceived the written agreement vacated.

As to *Richardson Taylor's* deposition; Lady *Lanesborough's* case (*a*) proves that, where there was a covenant to renew a lease at the end of twenty-one years, and, from circumstances, the contract appeared to have been mutually abandoned, expressions of the covenantor were not allowed to be set up for the purpose of reviving it. So, here, it would be monstrous that the *exparte* directions of *Nicholson* should be set up as evidence of his title.

(*a*) 2 *Bro. Parl. Cases*, 116.

His conduct had previously been, *per se*, an abandonment of the contract. Though no particular time was mentioned for performance, some reasonable period ought to be fixed within which it should have been ful-

filled. (*b*) Here *Nicholson* suffered *ten* years to elapse. But the reason for dismissing the bill in the case cited from *Brown's* Parl. Cases was understood to be that from the year 1714 to 1722 was too long a time after which to demand execution of the agreement.

Copeland, for the appellees. Mr. *Call's* whole argument is founded on supposing the consideration of the agreement to be, that *Nicholson* was to build a house and reside in it. But there is no such stipulation in the agreement. *Nicholson* only notified that he wanted that land for that purpose. Suppose he had mentioned in the contract with *Mayo* that he bought the land for a rope-walk, and yet had never built a rope-walk;—would this have set the contract aside?

(*b*) *Johnston v. Buffington*, 2 Wash. 116.

The case of a woman making a feoffment in consideration of marriage has been mentioned. In that case there must have been proof of the contract of marriage, and that the feoffment arose from it: but here there is no proof that the stipulation pretended to be the foundation of the agreement actually existed.

It is said that *Nicholson* never paid the money. Why did they not compel him to pay it?—That he never entered it on his books. This was a mere omission, and proves nothing. That he hever had the 2 3-4 acres surveyed. Was it more the duty of *Nicholson*, than of the other partners, to have made the survey? The lines, in this case, were so plainly described there was very little necessity for a survey.

But the agreement was not recorded! It would have been an absurdity to record it; because *Nicholson* had a *legal* estate in the whole land, and their *equitable* estate in the 2 3-4 acres was relinquished by the agreement under seal.

This lot of ground, however, was not included in *Nicholson's* estimate of his property! If a man, in making an estimate of his property, omits a part, though the deeds are in his desk, does this omission affect his title?

It is urged too that he estimated all his property at Rocket's at £1000 only. The smallness of this estimate is not to be wondered at; there having been a prodigious rise in the value of property about Richmond since that time.

A particular expression in his last will is also relied on. But it is evident he was there speaking only of the company's property *at the time of making the will*, not at all of

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the 2 3-4 acres which had been his own separate property for ten years before. One of the executors, in his answer, says, that he frequently spoke of the property as his own; and *Richardson Taylor's* deposition is to the same purport.

Warden, for the appellants, in reply, urged the great advantages which would have arisen to the partnership from *Nicholson's* residing on the land near the rope-walk, and being thereby enabled the better to attend to the business; and contended, therefore, that the words of the agreement ought to be understood as binding him to build a house and reside in it himself for that purpose. The value of property in Richmond had greatly increased: the erection of the rope-walk had considerably enhanced the value of the whole 16 acres. Yet he was to have the 2 3-4 acres at the *original price*. This shows that they must have had in view his building a house and residing in it; in consideration of which they consented to make so great a sacrifice.

A strong circumstance to prove that *Nicholson* abandoned the contract and considered it as vacated, was his having built a house, for the use of the *company*'s negroes on the 2 3-4 acres, and *charged them with the price of the building*. This evinces that the house was regarded by him as belonging to the company; and, if the house was theirs, the land on which it stood was theirs also.

Mr. *Copeland* asks why did not *Cringan & Atcheson* compel *Nicholson* to pay the money?—The answer is plain. Because they saw he had abandoned the contract. He says too there was no need of a survey, the boundaries being sufficiently plain. But those boundaries might have contained more than 2 3-4 acres of land; it was necessary, therefore, to run the lines, in the directions called for, so as to contain no more. Since *Cringan* was a professional man, *Atcheson* lived at Norfolk, and *Nicholson* was the superintendant of all the business of the company, *he* ought to have had the survey made, if the bargain had not been abandoned.

With respect to the expression in the *will*,—after the marks of abandonment which appear in the case, the court should consider him as speaking of the whole 16 acres; and, as to his estimate of his property,—it ought to be understood that he was valuing only the property which he held *severally*, without any other person's having a share. According to this interpretation of the will and of the estimate, both will be rational and sensible.

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Call, on the same side, cited 10 Co. Rep. 42, to show that at law an executory contract will be avoided by non performance, although the legal estate is conveyed; and the argument is *a fortiori* where no conveyance has passed.

The contract here was clearly conditional;(*c*) and was vacated by the delay to complete it.(*d*)

Copeland observed that the contract was completed when the writing was signed; the legal estate in the whole being in *Nicholson*, and no farther writings being necessary; that, if he had died the next day, the contract would have been in force; and that there was no intimation, *in his lifetime*, on the part of *Cringan & Atcheson*, that *they* considered the contract not in force. Why did they not sue for the money for which they sold the lot of 2 3-4 acres to *Nicholson*, instead of bringing this suit for the sum for which it was sold since his death? The great rise in the value of property here is the true cause of this suit. If, instead of £25, the 16 acres had originally cost £700 they would perhaps have sued him in his lifetime on the *contract*, and this suit would never have been brought.

Where is the evidence that *Nicholson agreed* to build a dwelling house? The executors only *conjecture* it. As to his building a house upon the land for the company; the cost of that house was only charged in the *general account of improvements*. There was no difference between his doing this, and his taking the company's money and paying for it. His failing to correct it by a *counter-entry* is no proof that he did not intend to do it afterwards.

(*c*) Plowden 142, 30. Dyer 70, pl. 46.

(*d*) 5 Vin. 534, 538. 4 Vez. Jr. 667. 5 Vez. Jr. 736. 1 Fonb. 384.

Friday, *Oct.* 16*th*—The Judges delivered their opinions.

Judge TUCKER after stating the case, in substance as it has been stated by us, said; The object of this suit is to set aside and annul an agreement, in writing, and under seal of all the parties, (in obtaining which no fraud or circumvention is suggested,) on the ground of its being abandoned and vacated by the general consent and agreement of all the parties thereto. The proofs on which they rely are the several CIRCUMSTANCES beforementioned.

That circumstances MAY amount to conclusive evidence of a general abandonment of an agreement by all the parties thereto is proved by lady *Lanesborough's* case, (2 Brown's Parl. cas. 116.) relied on by Mr. *Call*, and cited by *Powell* on contracts, 413, 414.

In that case the lord and tenants of a manor entered into an agreement for enclosing a part of a common; to

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effectuate which, the lord by a separate instrument had released each particular tenant from all quit-rents and services; and the tenants, by another, consented to the enclosure, and released their right of common. The enclosure was begun; but, upon some of the hedges being privately thrown down, and other obstructions happening, the *lord relinquished his design*, and the *tenants* CONTINUED *to enjoy their right of common*, and to *pay their quit-rents*, and to *do suit and service* IN THE SAME MANNER *as if no such agreement had ever been made:* but the instruments which had been executed were neglected to be cancelled. A question afterwards arose, between the alience of the lord, and a representative of one of the tenants, who had *paid quit-rent*, &c. and *enjoyed the common for five and twenty years* after the agreement entered into, whether these subsequent transactions did not amount to a waiver of the agreement; and it was held they did.

In this case the circumstances were extremely strong, and the conduct of the parties, on *both* sides, such as amounted to conclusive evidence of a *mutual intention* to abandon the agreement. The lord *desisted* from his undertaking to enclose the common which he had *actually begun;* the tenants *continued to enjoy their right of common* which had never been interrupted; and they not only *did suit and service* at the Lord's Court, but *paid their quit-rents*, as if no such agreement had ever been made; and this state of things *continued for five and twenty years;* after which it was held that the tenant could not be permitted to plead this *dormant* agreement in bar of an avowry made upon a distress for arrears of quit-rents. The case before us appears to me to fall very far short of this. There is not a single act, word, or circumstance proved on the part of the complainants, or even suggested in their bill, to show that they ever considered the agreement as abandoned, or that they wished or meant to abandon it, so long as *Nicholson* lived, nor, in fact, *until after the sale of the property* by his executors. *Nicholson*, it is true, was guilty of some acts of neglect. He never had the ground laid off; but no time was limited for doing this; nor is there anything in the contract to show that it was incumbent on *him* to do it, more than it was upon the plaintiffs. He never paid the money; nor was it ever demanded of him: he purchased another house near the rope-walk, and resided therein, and never built upon the lot: but, although the motive to the purchase seems to have been to build a dwelling house, there is no *condition*

that he shall build, and much less, that he was to reside thereon. He might have sold the lot the next moment; for he was to have it in fee-simple: he did not have the agreement recorded; but the law did not require it, even if it had been a conveyance, except as a protection against creditors and subsequent purchasers. He built a house upon the lot; but this might have been through mistake of the boundary lines, which were never actually extended until after his death. He charged the expense of this house to the general account of improvements in the company's books. This might have proceeded from the same mistake; or, if the house was intended for his own benefit, the error in charging it to the general account of improvements might have been corrected by a single entry: or the error might have been from the mistake or neglect of his clerk. There is not one of these circumstances, however strong, which might not have received, and which do not admit of satisfactory explanation, had he been called upon by the plaintiffs in his lifetime, or had they during that period *done* anything on their parts to manifest a desire of *rescinding* the contract. This is very different from the *doing suit and service* and paying quit-rents by a tenant, as well as enjoying the right of common by a tenant, for *five-and-twenty* years. None of these acts, nor their *object* could be mistaken; nor could they be founded in *mistake*.

Before I proceed to consider the evidence farther, I shall mention one or two other cases, which have been decided in the High Court of Chancery in England on the ground of *abandonment*. The first is that of a covenant in a mortgage, that, if the estate was to be *sold*, the mortgagee should have the preference. And, after the death of the mortgagor, his heir (knowing nothing of the contract, the counterpart of the mortgage having been delivered to the attornies of the mortgagee, who refused giving any copy,) entered into an agreement for the sale with a person who also knew nothing of it; and the mortgagee's attorney *insisted on payment of the money due*, on the ground that the security was insufficient for the principal and interest, *but never mentioned the mortgagee's right of pre-emption*, until *after* the estate was sold. And it was held that he could not claim to the prejudice of the purchaser, or of the heir, after having so long a time in which he might have done it before the estate was sold. 9 *Mod.* 2, 3, cited *Powell on Contr.* 421.

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This is nothing more than the common case of a purchaser without notice not being affected by a latent incumbrance, or covenant that is wilfully withheld from him, as in that case. And, here, it is to be remembered the mortgagee was plaintiff, and equity would not aid him.

Again, where a woman by a marriage-contract hath an exclusive right to her separate estate, but permits the husband to receive the rents and profits of it, the law will intend that she consented to the husband's receipt of them. *Powell v. Hankey*, 2 P. Wms. 82, cited *Pow. on Contr.* 421. But, in a subsequent case, Lord *Hardwicke* determined that this intendment of law may be rebutted by *parol proof*. 1 Atk. 269.

Now, in this case, the evidence of *abandonment* of this agreement is merely *circumstantial*. There is not a tittle of evidence of any intention of the kind on the part of the plaintiffs, until after the sale made by the executors; and the *presumption* arising from the *circumstances* already noticed in *Nicholson's* conduct is rebutted by the positive testimony of his brother, *Thomas Nicholson*, in his answer, and that of his clerk, *Richardson Taylor*, which is too strong and too pointed to be mistaken, and shows that he never had any such intention; but, on the contrary, that to the latest period of his life he considered the property as his own; which brings the case within the reason of that of *Ridout* and *Lewis*, 1 Atk. 269, above referred to.

On the ground of *abandonment*, which implies in this case the mutual consent of *both* parties to *rescind* a fair contract deliberately entered into between them, I see no reason for sustaining the complainant's bill. And as I have never considered a Court of Equity as possessing the right to *annul* such contracts upon any other ground than the *mutual consent* of all parties expressly given, or NECESSARILY IMPLIED, I think the chancellor's decree was so far right. And I think this Court ought to discountenance bills of this nature, the object of which is to annul and cancel a solemn and fair agreement, where all parties appear to have acquiesced in it without complaint until after the death of one of them. And I hold that there is a very solid and material distinction between bills of this nature and such as are every day brought to *compel* the performance of an agreement. In the one case, the Court (directing itself to the conscience of the defendant) says, you have solemnly entered into this stipulation or agreement, and we will enforce you to comply with it; in the other, it undertakes to annul and make void

what the consciences of both parties required to be performed, and what one of them is still willing to abide by.

The decree is, however, I conceive, defective in not directing the payment of the purchase-money with interest, and the repayment of the money expended in building the house for the negroes with interest from the time of the sale, or such other period as it ceased to be used for the accommodation of the negroes belonging to the company; considering the use of it as equivalent to the interest to that period. This I conceive to be the full measure of the relief to which the plaintiffs are entitled in this case.

Judge ROANE. This is a bill brought by the the appellants, praying that the agreement of the 19th of July 1792, may be decreed to be delivered up to be cancelled, and that the appellees may be decreed to pay, to each of the appellants one fifth part of the proceeds of the sales of the lands embraced by the said agreement. It prays that the said agreement, (which relinquishes the equitable title of the appellants to the land in question,) may be considered as no longer binding on them, on the grouud that a condition of building and residing on the premises, was understood to be a *part* of that agreement, which condition has not been performed; but, on the contrary, they contend that the testator of the appellees made his election to waive and abandon his rights under the same.

The appellants consider, and I think justly consider, that, although (notwithstanding this forfeiture and taking no advantage thereof,) they *might have* coerced the appellees' testator to have paid the money stipulated to be paid by the said agreement, and, probably, also have coerced the building and residence on the land, within a reasonable time, according to their construction of the agreement,(a) if, as to this, they were not barred by the act of Frauds, as applying to the original written agreement; yet that, on the other hand, they may waive the assertion of this right, and joining issue with the appellees in respect of their testator's abandonment of the agreement, consider it as wholly at an end, and subject to be delivered up to be cancelled. On this latter ground they have elected to proceed.

(a) See 1 Fonb. 161, note.

This agreement is to be considered, 1st, as upon its own face, independently of other proof or circumstances, and, 2ndly, as affected by such proof or circumstances.

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In the first point of view, I cannot entirely persuade myself that a condition of building and residing on the premises, is sufficiently *stated* in the agreement. Although *probably*, (for there is no proof on this subject,) considerable improvements may have been made on the rope-walk premises, since the purchase from *Mayo*, and before the date of this agreement, thereby enhancing the value of *every part* of the 16 acres; (to say nothing of the progressive increase of the value of property in and near the city of Richmond;) when we find that the 2 3-4 acres now in question were to be appropriated to the appellees' testator, *at the same price*, per acre, that the whole originally cost, it is naturally to be presumed that there was *some other* consideration or motive operating with the appellants in entering into the agreement in question. This consideration was, no doubt, the one stated by the appellants, and not denied, (if not admitted,) on the part of the appellees; a consideration which would have been really valuable to the whole rope-walk copartnery. The existence of this motive also gains great colour from the actual phraseology of the agreement in this particular, which is pretty strong, I admit, to import a condition. But, as it is *possible*, nevertheless, that the prospect of the building and residing upon the premises by *Nicholson* may not have been any part of the inducement to the grant: as men must be permitted to sell their property for even less than it cost them and to make bad bargains; and as, admitting this circumstance to have been in truth a part of the consideration expected and agreed upon between the parties, it may have been the *folly* of the appellants to have trusted to the *declaration* of the intentions of the appellees' testator, rather than to have exacted from him a *written condition* to build and reside upon the premises; we cannot enlarge the *representation* of his intention stated in the agreement, (as considered merely upon the agreement itself,) into an actual *condition or stipulation* to that effect.

Thus stands the case upon the written agreement singly considered.

The case is, secondly, to be considered in relation to other proofs and circumstances.

Some stress has been laid upon the circumstance that this agreement is contained in a solemn and *sealed* instrument. For my part, I throw the *seal* entirely out of the question, and only consider it as a written agreement comprehending the terms of the contract between the parties, and such as is required under the statute of frauds in

relation to a sale of land. The policy of that Act, in relation to certainty and the avoiding of perjuries, is as much answered by a written as by a sealed instrument. In considering this instrument, therefore, merely as an agreement under that statute, I shall not differ it from a memorandum or agreement merely in writing. If it were necessary to quote authorities on this point, *Powell* on Contracts, 436, &c. states many instances in which the most solemn and sealed agreements were considered as altered and waived by acts other than the execution of instruments deemed of equal dignity with them; the spirit of equity, especially as applying to the construction of the statute of Frauds, exploding the maxim "*dissolvitur eodem ligamine quo ligatur.*"

It is contended by the appellants that the condition of building and residing on the premises was a part of the contract between the parties, although it may not have been explicitly stipulated in the writing. Such an addition to the contract, if resting entirely upon *parol* proof, the policy of the law, in relation to the danger of perjuries, would not permit to be established. If, for example, 20 men were to swear that they well recollect such a condition to have been agreed upon by the parties at the time of executing the writing, their testimony would not avail under the statute:—but, if the appellees' testator has himself stated this *in writing;* or, if he has done acts *entirely incompatible* with any other idea, the established principles of construction of the Act of Frauds allow us to take such admissions and acts into account, in forming a conclusion.

In the case before us, it is stated in the bill, and echoed, *totidem verbis*, in the answer, that the whole 16 acres were purchased "for the purpose of establishing a rope-"walk thereon, and *houses for the accommodation of la-*"*bourers employed in that business.*" It is also admitted in the answer that, "after the appellees' testator purcha-"sed a seat for his own residence near the rope-walk, he "built, upon the spot of ground mentioned in the said "written agreement, a brick house, as *a lodging house for* "*the slaves employed at the rope-walk*, the expense of build-"ing which he CHARGED *on the books* of the said rope-walk "company to the general account of improvements."

Taking these two admissions together, can there be any doubt but that it was either originally, or at least subsequently agreed by the appellees' testator, and that in *writing* (I here refer to the entry in the company's books,) that the land, on which the company (through him and by

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him,) built a house with their own money, and for one of the very purposes for which the land was originally purchased, *ceased to be his land*, and was solemnly admitted by him to be the land of the company. If, *at this time*, a part of the *rope-walk works* themselves had been extended into this ground, could he afterwards have pretended a *private* property therein?—Yet the building a house for the accommodation of the negroes of the concern comes as much within the end and purpose of the original purchase, as before admitted, and is as much a badge of *partnership property* as the erection of the very works themselves thereupon would have been: the works themselves could not have been prosperously carried on without such necessary appendages: every argument, therefore, which would be drawn from the erection of the *rope-walk houses themselves*, equally applies to the houses in question. If, at this time, the testator of the appellees had abandoned *in writing*, by a new agreement written on a transitory piece of paper, his claim to the premises, would it have been more certain or explicit? would it more clearly have related to the original agreement, and precluded the danger of perjuries depending upon parol proofs, than this *permanent writing* contained in the *books* of the company, and this coeval and concurrent act of building a house with the company's money, and for their negroes upon the very land in question?—As it is not usual to waive and abandon an *absolute* purchase of lands, shall not this act of waiver be referred to an agreement containing a condition which has not been complied with? Shall it not be referred to and be construed as explanatory of the agreement of July 1792, as contended for on the part of the appellants? And, even throwing the idea of a relation to the original agreement out of the question, does not this case come strongly within the reason of the principle which declares that, if land be purchased in the name of A. and paid for with the money of B., A. is considered to hold in trust for B., or, in other words, the land is considered as belonging to B.

If the appellees' testator were now alive, and had *confessed* either that the condition in question had originally been agreed upon between the parties, and had not been complied with, or that he had subsequently abandoned and waived an agreement which in itself had no condition, (however improbable this last may be,) it is certain that this *confession*, even under the act of frauds, would have entirely availed the appellants, and superseded the necessi-

ty of producing a written agreement; and, considering the existence of the above *entry* in the books, and *erection* of the house for the negroes, it is impossible but that he must have confessed it, if he had been alive:—he could not justly have contended that the property (which he had admitted to belong to others, by the most explicit and unequivocal acts,) still remained his own.

Even considering the entry in the books of the company as entirely a *distinct* and *after*-transaction, it was certainly as competent for the appellees' testator thus to *retransfer* the estate to the appellants, as for the appellants to have originally conveyed it to him by the agreement in question. I have already said that I consider the agreement of July 1792 as merely a *contract* reduced to writing; and, with respect to the *entry* in the books of the company, it is well known that a *letter*, *memorandum*, or any irregular writing is sufficient under the act of frauds, provided it be signed by the party, and the terms of the agreement be distinctly stated. I will not here stop to inquire whether that entry (standing singly, and considered as an after and distinct agreement) would be held as a sufficient writing under the statute:—but this I say, that, taken in connexion with the erection of the house for the use of the company, it amounts to irresistible proof of an abandonment of the agreement, if unconditional, or, if conditional, that that condition has not been complied with.

If, in the case before us, the testator of the appellee had written a quire on this subject, on transitory sheets of paper, he could not more clearly have evinced his agreement to *yield* or *transfer* the land to the company, than by the entry in question followed up by the erection of the building for the company's negroes and paid for with the company's money. This entry and erection completely estop the appellees from saying that the condition of building and residing was not a part of the original agreement, although not therein inserted, or, at least, estop them from denying a waiver of the land on their part; it prevents the necessity on the part of the appellants of resorting to *parol* testimony; it consequently shuts out the danger of perjury which the act of frauds was meant to prevent;—and this case comes fully within the *reason* of those cases in which the parol agreement is *confessed* in the defendant's *answer*, or *confessed by his carrying the agreement into execution* on his part: after these unequivocal acts, it does not lie in the mouth of the appellees to call for proof from the appellants to support their construction of the

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agreement. Delivering possession of land is always deemed an execution of an agreement, so as to dispense with writing under the statute; (1 Fonb. 180, Phila. Ed.) and in this case I consider the acts in question equivalent to a delivery of possession of the premises to the company. This case is infinitely stronger than the case of *Only v. Walker*, 3 Atk. 407, where the defendant having *denied* the agreement in his *answer*, evidence was admitted to show that he had confessed the agreement at a prior time, which being supported by the testimony of *one* witness prevailed. Our case is stronger, not only because the condition contended for is not *denied* by the answer, but also because the acts done by the appellees' testator, *ut supra*, are much more conclusive against him than a mere verbal confession.

As to the abandonment evinced by those acts, it is powerfully supported by several of the other circumstances stated in the bill.—These, *singly*, might not be sufficient, or might be susceptible of plausible answers, but coming in aid of this principal circumstance entirely turn the scale.

This evidence of abandonment is not confronted by any conflicting testimony. The answer of *Thomas Nicholson* stating his brother's conversation respecting this land "*when he was about to remove to the seat he had purchased*," if it is not balanced by the answer of the other appellee, does not necessarily relate to a point of time *posterior* to the entry and erection aforesaid, (the dates of which are not shown,) and therefore may be considered as applying to a period anterior to his conclusive waiver of the agreement.

As to the testimony of *Richardson*, it is not only, *perhaps*, in conflict with some of the circumstances in this case, (such as the inventory of his estate made by the testator, &c.,) but applies to a point of time long after the testator had concluded himself as aforesaid:—he was not *then* at liberty to *resume* the property which he had long before given up and abandoned.

But it is said that *Nicholson* might not have known that the house admitted to have been built for the company's negroes was located on *his* land, and that there is no conclusive proof that the money was paid by or charged to the company.

I will premise that the latter part of the first objection is in conflict with the second:—the *admission* that the house was built for the company's negroes is in itself pretty

strong evidence that it was built with the company's money:—but, besides, a charge for the expense of building it is contained in the books of the company "to the general account of improvements:" what improvements? improvements on the company's premises, and for the company's account—As to any mistake on the part of *Nicholson*, in respect to the spot on which this house was erected, none such is pretended, or can be conceived. The defendants explicitly admit that the house was built "upon the spot of ground mentioned in the written agreement." An inspection of the boundaries stated in the agreement will show that it is highly improbable that any mistake in this respect could possibly have existed; besides, the appellees' testator well knew the boundaries not only as existing upon the paper, but as marked out upon the soil; he showed this ground to his brother *Thomas* some years before his death, and he gave a memorandum of the boundaries to his clerk, wishing him to set up cornerstones on the premises, a little before his death, without, in either case, stating any uncertainty as to the lines. Admitting, therefore, that it was the business of this court to make the appellees' case better for them than they themselves have chosen to make it, it would require a great degree of *astuteness* in us to show that any mistake in locating the house in question could possibly have existed.

With respect to this house, I will remark that the appellees' testator has not only neglected to charge *himself* on the books of the company, with the expense of building it, but has omitted to charge the company with the *rent* thereof either on the books of the company, or his own private books; an omission which militates very strongly against the ground of private property now set up by the appellees.

As to the case of *Lanesborough* v. *Ockshott*, it is much stronger than the case before us, and yet a waiver was held to have taken place. In that case there were solemn and *unconditional* agreements on both sides, and yet circumstances were permitted to show that the agreements were waived. There is nothing in the case, (as appears from the accounts I have seen of it,) which shows that any great stress was laid upon the *length of time* in which it had seemed to be acquiesced in. In that case there was the enjoyment of the right of common on one hand, and the receipt of quit-rents on the other: in this case

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there is a complete abandonment of the land by the appellees' testator, and enjoyment of it by the appellants.

But it is said by the Judge who preceded me that no act was done by the appellants notifying their acceding to the waiver. The answer is, first, that this act of their *agent* absolved them from the necessity of it, if it had been limited, as to them, in point of time; and 2dly, that no such limitation exists in this case. They were at liberty to join issue as to the waiver, *at the time of bringing their bill*, which they have done.

He has also said that the circumstances in this case are rebutted by the testimony of *Thomas Nicholson*, supported by that of *Richardson Taylor*.

I have already said that the former relates to a point of time antecedent to the actual abandonment by *Nicholson*, and that the latter refers to a period when *Nicholson* had estopped himself from resuming the property, which, years before, he had solemnly given up, subject, however, to an acceptance thereof on the part of the appellants.

I have thus considered this strong evidence of abandonment, as it were, in a double aspect—1st, as referable to and explanatory of the original agreement; and 2dly, as amounting in itself to a substantial and distinct retransfer of the property to the company.

The last is least probable; although, on the ground of an *implied trust*, these circumstances might be amply sufficient to vest the land in the company. The first is most natural and reasonable; and amounts in my judgment to conclusive proof that the original agreement *was*, as it is alleged by the appellants to have been:—and these circumstances are strong enough to let in the appellants to the *benefit* of that agreement, the act of frauds notwithstanding.

The result of my reflection upon this case therefore is, that the dismission of the bill was erroneous, and that its prayer ought to be granted.

Judge Lyons. When this cause was first opened, I thought it so plain, clear, and simple as scarcely to admit of a doubt, and was surprised at the decree.

The suit is said to be brought to set aside a sealed contract fairly entered into without fraud or circumvention. But I view it in a different light. I consider it as a suit for specifick performance of an agreement and for execution of a trust; since *Nicholson* was agent, factor, and trustee of the company, and, instead of building a dwelling

house for himself on the 2 3-4 acres, and paying for them, (as he should have done if he had meant to appropriate them to himself,) improved them for the company, and with the money of the company, and, therefore had no exclusive right to them, according to the plain intent and meaning of the agreement. He only notified a *wish* to have part of the 16 acres laid off for the purpose of building a dwelling house. What did *Atcheson* and *Cringan* say? We do agree that the land be laid off in the following manner. For what use and purpose? *That* is not *expressed;* but surely the words "*for that purpose*," or "*the purpose aforesaid*," were necessarily implied according to every rule for the construction of deeds.

Judge *Willes* has collected and laid down plainly and clearly the rules for construing deeds, in the case of *Parkhurst v. Smith* in his Reports, p. 332 and 334. These rules are—1. "that the construction ought to be favourable, and as near to the apparent intent of the parties as possibly may be and the law will permit;—2. that too much regard is not to be had to the natural and proper signification of words and sentences, to prevent the simple intention of the parties from taking effect; for the law is not *nice* in grants, and therefore doth often transpose words contrary to their order, to bring them to the intent of the parties;—3. that, when the words of a deed are doubtful, the first thing to be inquired into is the intention of the parties;—4. that, if the intent be plain and clear, such construction ought, if possible, to be put on the doubtful words as will best answer the intention; and that which manifestly tends to overturn and destroy it ought to be rejected;—5. that, where the intent is plain and manifest, and the words doubtful and obscure, it is the duty of a Judge to be *astute* in endeavouring to find out such a meaning as will best answer the intent of the parties;*—6. that, where there are two clauses in a deed repugnant to each other, the first shall be received and the latter rejected.

These rules are plain and rational, but are now attempted to be controverted; which is not at all surprising, since, unfortunately for mankind, even the fundamental rules of morality have, at times, become the subject of doubt and discussion by the learned and ingenious; which shows, as *Willes* observes, what the wit of lawyers can do when employed in making objections.

* See also the case of the Earl of *Clanrickard, Hobart* 277.

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Cringan & Atchison *against* Nicholson's Executors.

Let us apply these rules to the sealed instrument now in question; and we shall find the intention of the parties, on which the contract was founded, apparent from its own words. Why did *Nicholson* express his *wish* in the articles, if that wish was not to be regarded and considered as the *inducement?* If it was the *inducement*, it was part of the condition of the contract, and the rules of construction will consider it as such. That he was bound to build the house is an easy and necessary implication, and as binding as if expressed. The language conveying this implication is contained in the first clause, and nothing repugnant to it is found in the subsequent clauses: but, if there were, such repugnant part should be rejected.

He never built; he never surveyed; he never paid.

But it is said that the partners should have sued and compelled payment. Whose duty was it to do it? Was it not his, as agent, factor, and trustee for the company who confided in him that he would attend to the interest of the company, and do what was just, right, and proper on his part? Suppose any other person had been the purchaser; would it not have been his duty to have compelled payment, and not to have suffered money, which might have been employed in their trade and business to great advantage, to lie dead for ten years, without ever receiving even interest? The partners, confiding in him, may not even have inspected the books; and, seeing him build a house on the land for the use of the company, had good reason to believe that he had abandoned his project of building on it for himself.

But he sowed clover! So do many in this town on the lots of other people; and, I suppose, Mr. *Nicholson*, as agent for the company, might have sowed clover on any part of the 16 acres that could be spared for that purpose; but surely that would not give him an exclusive right to the soil, and a fee simple in the land.

The agreement was never executed on the part of Mr. *Nicholson* whose business and duty it was to execute it, if he meant to claim any benefit from it. In its own nature, it was merely executory; and his whole conduct proves that he never meant to execute it: the property, therefore, was never changed, but belonged to the company, and having been sold, the appellants have a right to their respective shares of the money; that is, each to one fifth.

It is said that, if the land had fallen in value, they would have made him pay the purchase-money. How could they have done that, when he never built upon it for him-

self, but built upon it for their use, and with their money which increased its value? The truth is, that if it had not risen in value, *Nicholson's* heirs would never have claimed it; besides, the very words of the agreement made it optional in him, that it might be laid off by him, and valued, and paid for, if he chose to do so. The company had the use of it; and, having built upon it, could never make a purchaser pay for it.

I have no difficulty in saying the decree is erroneous and ought to be reversed.

The opinion directed to be entered was as follows:

"This Court is of opinion that, as the articles of agreement made and entered into on the 19th July 1792, by and between the appellants *John Cringan* and *William Atcheson*, and *George Nicholson* since deceased, as partners in the rope-walk company, mentioned and referred to in the bill and answer filed in this cause, for laying off a part of sixteen acres of land, which had been purchased by the said *George Nicholson*, as superintendant and agent for the rope-walk company, of *William Mayo* for the use of the company, were made at the request of the said *Nicholson*, to accommodate him, for the purpose of building a dwelling house; and as the said *Nicholson* lived ten years after the date of the said agreement, and did not survey or lay off the part of the said land he wished to have for the purpose aforesaid, or build a dwelling house thereon, or pay the value thereof according to the said agreement; but, instead thereof, did build a house thereon for the use of the company, at the cost and charges of the company; he thereby relinquished and abandoned all right to the part of the said land he wished to have laid off for his use under the said agreement, supposed to be about 2 3-4 acres; and the said land having been since the death of the said *George Nicholson* sold by the appellees as his executors, they ought to account with the appellants for the amount of the sales, and pay to each of them one-fifth part of the money arising from the said sale, with interest from the time the said purchase-money became due."

Decree reversed, and cause remitted for farther proceedings according to this opinion.

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MURRELL *against* JOHNSON'S *Administrator.*

Wednesday, October 14th.

A bond being given, conditioned to be void upon the obligor's paying all costs and damages, which shall be awarded, in consequence of the obligee's delivering to him a negro slave, a judgment obtained by a third person against the obligee for the same slave is sufficient to warrant an action on the bond, without proof of satisfaction of the judgment.

A slave the property of A. is sold by B. (without authority) to C., and by C. delivered to D.; A. brings an action of detinue, and obtains judgment against C:—he cannot afterwards bring an action for the same slave against D., notwithstanding his judgment

Stephen Johnson was employed by *Janet Murrell* as an agent to purchase for her a negro girl. He accordingly purchased one of a certain *Thomas Pritchett;* but, before he delivered her to Mrs. *Murrell*, he was warned by *Benjamin Pritchett* not to part with her, as he, the said *Benjamin* claimed her as his property. He thereupon refused to deliver the said girl to Mrs. *Murrell*, until he should be indemnified for so doing; in consequence whereof an indemnifying bond was executed by Mrs. *Murrell*, with *Samuel Murrell* her security, conditioned to be void upon her paying all costs and damages that should be awarded in consequence of the delivery of the negro to her. *Benjamin Pritchett* brought suit in the County Court of Caroline, and recovered the negro, (or her value, if she was not to be had,) of *Johnson*, who, on his part, brought an action against *Thomas Pritchett*, on the warranty in his bill of sale, and obtained judgment; but the execution was returned "no effects." After this, *Philip B. Johnson*, administrator of *Stephen Johnson* deceased, brought suit on the indemnifying bond, in the District Court of Charlottesville, against *Janet* and *Samuel Murrell*, who pleaded "covenants performed," upon which, issue being joined, the parties went to trial.

At the trial of the cause, the record of Caroline Court was introduced to show the recovery by *Benjamin Pritchett* of *Stephen Johnson;* but the counsel for the defendants moved the court to instruct the jury "that, by law, the "plaintiff could not sustain his action against the defen- "dants, unless he should prove an actual discharge or "payment of the amount of said recovery by the defendant "*Johnson* to the plaintiff *Pritchett;* but the court refused "to give such instruction to the jury; on the contrary, "instructed them that the judgment against *Johnson* was "sufficient to enable the plaintiff to recover, without proof "of payment of the amount of such recovery;" to which opinion of the court a bill of exceptions was filed.

The counsel for the defendant moreover moved for an instruction to the jury, that an action of detinue was still maintainable by *Benjamin Pritchett* against *Janet Murrell:* and the court instructed the jury "that a recovery might "so be had of the said slave, unless the said *Janet* could "prove the payment of the value of the said slave by *John-* "*son* to the said *Benjamin Pritchett.*" The jury found a verdict for the plaintiff, and judgment was entered; from

which an appeal was taken by the defendant *Samuel Murrell* to this court.

Randolph, for the appellant, made two points, 1. that the judgment against *Johnson* was not sufficient to give him an action, but that he ought to have paid the money first; and 2. that, as the slave was purchased by *Johnson* with Mrs. *Murrell's* own money, an action of detinue might still be maintained *against her* by *Benjamin Pritchett*, if the money had never been paid to him; and therefore she ought not also to be subject to the action of *Johnson*.

against C. is unsatisfied.

In support of the first point, he contended, that the intention of the bond was to indemnify *Johnson* against any injury which he should sustain in consequence of delivering the negro; the words being that *Janet Murrell* should pay all *costs and damages awarded* against him; and that there was no evidence of the smallest injury sustained by him, since it did not appear that he had been compelled to pay the money.

A judgment for the *plaintiff* ought not to be reversed, on the ground that the court, at the instance of the *defendant* gave an erroneous instruction to the jury.

In support of the second point, he observed, that if *Benjamin Pritchett* had received the money of *Johnson*, his doing so might have been considered as a confirmation by him of the sale of the slave; but otherwise not;—that either his actual receipt of the money, or anything equivalent thereto, which would amount to an abandonment of his claim to the slave, would be sufficient to authorize *Johnson's* action against the *Murrells;* but, no such circumstance appearing, his right remained undiminished, and might be prosecuted against Mrs. *Murrell* in whose possession the slave was.

Nicholas, for the appellee. The spirit of the contract where consistent with the words, is to be followed; but not a *supposed* contract inconsistent with that entered into by the parties. Here the contract was, that Mrs. *Murrell* should pay such costs and damages as should be *awarded* against *Johnson;* the plain import of which was that she should pay whatever was *recovered* of him. It was not a general stipulation to *indemnify*, but a special agreement to *pay* whatever should be recovered. If the contract had been as Mr. *Randolph* contends, its words would have been *to refund whatever Johnson was compelled to pay.*

The judgment against *Johnson* was in itself an injury to him, though he had not satisfied it; for in an action of detinue bail is required; and no doubt he gave it:—his person was therefore bound, and his bail might deliver

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him up. His having made an ineffectual attempt against *Thomas Pritchett* ought not to bar him of his suit for indemnification.

As to the second point, *Benjamin Pritchett* having made his election to sue *Stephen Johnson* for the negro, and having obtained judgment, he cannot now sue Mrs. *Murrell*. That judgment could be pleaded in bar of such suit. But whether this be so or not, if the court gave an erroneous instruction to the jury, it was an error in favour of the *defendants*, of which the *defendants* therefore cannot take advantage.

Randolph in reply. At law Mrs. *Murrell* could not discharge herself from this judgment by surrendering the slave to *Pritchett*. A court of law does not contemplate what may be done in a court of equity.

Nicholas. It was in her power to have removed this difficulty before the trial; because she might have delivered the negro to the sheriff when he had the execution in detinue.

Randolph. She might never have heard of that suit, and was no party to it.

Saturday, October 17th.

Judge TUCKER, after stating the case, made the following observations: Although no case was cited at the bar which appeared to be peculiarly applicable to this question, I was struck with the idea that I had seen such a one. The cases of *Rust v. Ridgeley*, Cro. Eliz. 264, and *Bothright v. Harvey*, Ib. 369, (which latter case is referred to in 3 Bac. Abr. 707, old ed.,) are both expressly in point; and in the first it was resolved that, immediately upon the judgment given, the plaintiff was damnified; for his body, goods, and lands are liable to the execution, and, if he afterwards alieneth his lands, he cannot, by reason of this judgment, warrant it to be free from incumbrance; so that by the *very judgment* he is damnified; and the court added that, if the defendant, after the judgment, had paid the debt, or, in the case before us, had delivered the negro to *Benjamin Pritchett*, still it would not serve; for *Johnson* (or the plaintiff in that case) was damnified before. And the same doctrine is expressly repeated in *Bothright v. Harvey*.

There is another point stated in the bill of exceptions, which appears to have been very improperly introduced, upon which the court instructed the jury as requested. No exception was taken to the opinion of the court, and therefore it seems to me to be unimportant in this case. I shall only say that I do not concur in opinion with the Judge who gave it.

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The opinion of the court was entered as follows:

"This court, not approving of the opinion and second "instruction given by the District Court on the trial of this "cause, as stated in the second exception to that opinion "filed in this cause, but considering the instruction as "immaterial to the issue tried, is of opinion that there is "no error in the first instruction excepted to, nor in the "judgment. Therefore it is considered that the said "judgment be AFFIRMED."

LIPSCOMB's administrator *against* WINSTON, administrator of LITTLEPAGE.

Tuesday, Oct. 13th.

Where an injunction is granted to a judgment, and an account between the parties directed, the commissioner ought not to give the plaintiff at law credit for claims not exhibited to the jury, nor mentioned in the answer, and which are prior in date to the commencement of the suit.

A sheriff who indulged a

This was an appeal from a decree of the late Judge of the High Court of Chancery.

The bill states that the complainant is administrator of *Ambrose Lipscomb* late of Hanover County, deceased; that, in October 1790, *Richard Littlepage* instituted a suit against the said decedent in Hanover Court, and obtained a judgment, on an account, for the sum of £12 19 3; that, from a settlement and receipt, (exhibited with the bill,) the complainant believes his intestate to have settled with and paid to *Thomas Starke* the sum of £70 14 10, in discharge of taxes for the years 1787, 1788, 1789 and 1790, and of other accounts; that he believes the said *Starke* acted as deputy sheriff, in the said county of Hanover, during the same years, and was duly authorized to receive said taxes, fees, &c.; that his intestate, as appears by a receipt dated the 2d of March, 1783, paid *William Tompkins*, (who the complainant believes also acted as a deputy sheriff,) ten pounds in a warrant: from which exhibits the complainant believes that his intestate on the 29th day of October 1790, was indebted to *Littlepage* in the sum of £12 19 3, and no more: that, since the death of his in-

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testate, *Littlepage* brought suit against him as administrator: that the said suit was dismissed for want of a declaration, but afterwards reinstated on motion: that he did not know that the same could be proceeded in, without some process served on him after it was reinstated: that the verdict was therefore by surprise: that the amount recovered was £213 14 7½, without allowing to his intestate any credit, except for £26 4 9½; that if be had been apprised of the trial, he could, as he believes, have satisfied the jury that nothing was due; he therefore prayed an injunction to the judgment, and for general relief.

The injunction being granted, *Richard Littlepage* filed an answer to the following effect:

That in the year 1783, he qualified as deputy sheriff in Hanover, under *Geddis Winston*, and continued to act as such for the years 1783, 1784, 1785, 1786, 1787, 1788 and 1789, during which years the intestate of the complainant became indebted to him in the sum of £103 10 3½ *specie*, and £36 6 4½ *certificates*, as per account annexed: that, on the 1st of May 1798, a balance was due him of £141 14 3 *specie*, and £58 15 8 *certificates*, including interest to that day on both sums; that, on this account, the judgment was rendered against the complainant as administrator, for £213 14 7½ and costs; that the verdict was not obtained by surprise; that while the cause was depending, and twelve months before the verdict, the complainant had an interview with him, and proposed a meeting to settle the accounts; but the complainant failed to attend at the appointed time and place, and the defendant was obliged to proceed in his action: that the suit against the complainant's *intestate*, in which the verdict for £12 19 3 was rendered, was upon an old private account, of long standing, annexed to the answer; that all the items in the said account were just; but, for want of legal proof, no more than the last mentioned sum was recovered: that *Starke* acted as a deputy with him during the years 1787, 1788, and 1789; that *Lipscomb* had two estates in Hanover; one in the district allotted to *Starke*, and one in the respondent's limits; that whether any part of the taxes within the said limits was included in the sum paid *Starke*, he cannot speak with certainty; but he knows that part of that sum was for the taxes of 1790, when the respondent did not act;—that *Tompkins* was deputy sheriff in Hanover, in 1781 and 1782, and had nothing to do with the taxes of 1783; and that his receipt cannot affect

man for his taxes, in consideration of which the latter agreed to indemnify him by paying all damages, which the commonwealth might recover of him in consequence of his failing in due time to pay the said taxes into the treasury, was allowed to recover the amount of such taxes, with lawful interest, from the times when respectively payable.

Part of those taxes being payable in *certificates*, the value of the certificates, *at those respective times*, was decided to be the rate at which they ought to be allowed; and not the value *at the time of making the allowance*.

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the respondent: that the reason his account against *Lipscomb* for *taxes* was kept separate from his *private* account, was, because *Lipscomb* had agreed with him, in case he would grant him indulgence for the said *taxes*, to indemnify and save the respondent harmless by paying to him all such damages as the commonwealth might recover of him in consequence of his failing to pay in due time the said taxes into the treasury: that when his property was, in 1792 and 1793, under execution for a balance due the publick, he urged *Lipscomb* to pay what he owed; who gave strong assurances of payment, but never made any during his life; and that after his death the respondent was constrained to sue.

A person coming into a court of equity to impeach a judgment at law must, on his part, do what equity requires.

On the 16th of March 1801, the suit abated by the defendant's death, and was afterwards revived against *Wm. O. Winston* his administrator.

An account was directed; and the commissioner made a report, in which he charged the estate of *Ambrose Lipscomb* the complainant's intestate with *certificate* and *specie* taxes for the years 1783, 1784, 1785 and 1786, and with the *certificate* and *specie* taxes *on John Lipscomb's estate* for 1783, 1784, and 1785,—rated the certificates at their nominal amount, deducting only five per cent for depreciation of value, and allowed interest, on the several taxes, from the times when the same were respectively payable; but disallowed the claim of *Littlepage's* estate for the taxes of the years 1787, 1788, 1789 and 1790, and that of *Lipscomb's* estate for a credit on account of the ten pounds stated to have been paid to *William Tompkins*. The last mentioned credit was not admitted, because the receipt was dated in 1783, and *Littlepage* claimed no taxes prior to those of 1783, which were collectable in 1784. In estimating the value of the *certificates*, the commissioner was governed by a certificate from Messrs. *Pickett, Pollard, & Johnston* stating the *present value* of such paper; and allowed the smallest of two prices at which they said they were selling. Sundry depositions and affidavits were exhibited before the commissioner by the complainant stating various circumstances, which, together with the mode of commencing the account of *Littlepage* against *Lipscomb*, for sundry items, (in which the taxes were not included,) the several nonsuits at law suffered by *Littlepage*, and the length of time, were relied on as presumptive proof that the claim had been fully discharged. Opposed to this circumstantial evidence, the defendant filed several depositions: but the commissioner rejected them on

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both sides. He also did not allow to *Littlepage's* estate several items of a private nature which he had blended with his account for taxes—To this report the complainant excepted.

1. Because the charge of taxes for the years 1783, 1784, 1785 and 1786 ought not to have been allowed; since *Littlepage*, long after those taxes were due, had sued *Lipscomb;* stating an account up to a posterior date, in which the said taxes were not comprehended; and the circumstance that the taxes for the subsequent years had been paid, ought, (as in the case of rent-arrear,) to be received as proof that nothing was due for the preceding years.

2. Because the commissioner had charged the complainant with the taxes on *John Lipscomb's* estate, on no other evidence but that of *Ambrose Lipscomb's* having been his administrator; although *Littlepage* himself had neither made this charge in his account, nor insisted on it in his answer; the same being *first brought forward* in the commissioner's report.

3. Because *interest* had been improperly charged, there being no right to charge interest, except on the *sums paid by Littlepage* for *Ambrose Lipscomb*, and no evidence being adduced that any such payment had ever been made.

4. Because the certificates were debited at their *present advanced value*, whereas, if the complainant was ever chargeable with them, it could only be *according to their value when he became chargeable.*

5. The complainant excepted generally to the charges in the report, contending that by the proofs exhibited nothing appeared to be due to the estate of *Littlepage*, and that his answer, having been disproved in sundry particulars and shown to be wholly unworthy of credit, ought not to be regarded.

6. He also excepted to the principle avowed by the commissioner of throwing the *onus probandi* on the complainant, whereas, the trial at law having been by *surprise*, the evidence to support the account produced by *Littlepage* ought now to be the same with that required before a jury, in which respect its incompetency was manifest.

The chancellor by his decree confirmed the report; and directed the injunction awarded the complainant to be dissolved as to £159 8 7, (the sum stated by the commissioner to be due,) and perpetuated as to the balance; and the costs to be equally borne by the parties:—from which decree, *Lipscomb* appealed.

Randolph, for the appellant, insisted on the various exceptions abovementioned, and contended that he came properly into a court of equity, on the ground that the verdict at law was obtained by surprise, no notice having been given of the reinstatement of the suit.

He observed, in support of the 4th exception, that, if *Lipscomb* had been a delinquent *trustee*, it might have been reasonable to charge him with the *nominal* amount of the certificates: but here the case was widely different: the sheriff had probably bought those certificates at only *5s* in the pound, and ought to receive no more than he gave for them. *Littlepage* was in reality a *trustee* for *Lipscomb;* and, upon principle, as such, should have done the best he could, and not have speculated for his own advantage. The case of an *executor* is parallel to this. If he pays a debt of his testator at *5s* in the pound, he cannot charge the whole amount to the estate.

"*In odium spoliatoris sunt omnia præsumenda.*" But that maxim does not apply to this case. The commissioner therefore ought not to have presumed against *Lipscomb* without proof.

Judge LYONS. If you open an account in equity, you can only do it so far as you can show error.

Randolph. This is the rule where the party applying had an opportunity of defence at common law; but not otherwise.

Nicholas, for the appellee, contended,

I. That the exceptions had been properly overruled. As to the first exception, he said it was the practice of *Littlepage* to agree with the people that, in case of his indulging them for taxes, they were to pay him any damages and charges which might be recovered by the commonwealth in consequence of their failing to pay.

Judge TUCKER. Is not this a *turpis contractus?*

Nicholas. It might have been a fair agreement to provide against contingencies. But this is unimportant, as we do not claim the *damages*, and they have not been allowed us. The object of the argument is only to explain the reason of *Littlepage's* keeping a separate account for the taxes.

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There is no analogy between the case of *rents* and this of taxes. Such is the connexion between a tenant and his landlord, that payment of the prior rent is presumable where the posterior has been paid. But, in this instance, the greater part of *Lipscomb's* estate was in *Starke's* precinct; and it does not follow, because *Starke*, by his assiduity, made collections for certain years, that other deputies did the same for the preceding years. *Receipts* are produced for the payments to *Starke*, and for a payment in 1793. This shows that *Lipscomb* was in the habit of taking care of receipts. Why then does he not produce *receipts* for the other payments, if they ever were made?

As to the second exception, the words of *Tompkins's* receipt, dated March 2nd, 1783, show that the taxes on *John Lipscomb's* land were paid by *Ambrose Lipscomb* his administrator.

The third and fourth exceptions are not better founded. Where the sheriff agrees to pay a man's taxes for him, his liability to the publick is a sufficient consideration for him to recover the money. It is said there is no proof that this money has been paid into the treasury. But the land was listed on the commissioner's books; the sheriff was charged according to those books: judgments have been obtained on behalf of the commonwealth against him; and *Lipscomb* has been exonerated. The sheriff was liable to *damages and interest*, and ought, therefore, to recover *interest* at least. There is no reason to disallow him the present current value of the certificates.

In answer to the fifth exception, Mr. *Nicholas* took a view of the testimony, and compared the various depositions with each other; from which he inferred that a balance was established to be due from *Lipscomb* to *Littlepage*, and that no part of the evidence contradicted the answer.

The sixth exception, he observed, was groundless, because the commissioner certainly proceeded on *proofs* before him; not on a *presumption* against the complainant. But, as there had been a trial before a jury, the utmost the *complainant* in *Chancery* could do was to surcharge and falsify the account of the *plaintiff at law*. The complainant is said not to have been present at the trial. But the plaintiff at law could not have obtained a judgment unless he had proved his account.

II. The commissioner did wrong in rejecting the claim of *Littlepage* for the taxes of the years 1787, 1788, 1789,

and 1790, the amount of which ought now to be added to the sum decreed the appellee.

It was a mistake in the commissioner to suppose that *Starke's* receipts covered all the taxes due from *Lipscomb* for those years; since he had other lands in parts of the county not in *Starke's* precinct.

III. As there was no proof of surprise on the complainant, and it is denied in the answer, the injunction ought not to have been sustained.

A defendant's own *neglect* is no reason to permit his going into chancery. A sufficient reason should be shown for his not making a defence at law. The only reason assigned, here, is that he did not know that the suit could be reinstated on motion. Ignorance of law is no excuse. But, as it appears, he was acquainted with one point of law, viz. that the suit could be dismissed at the rules for want of a declaration, it is presumable he must have known something of another: that it could be reinstated. No doubt, he consulted counsel as to the steps he took; and his counsel ought to have informed him that the dismission at the rules was not conclusive. Besides, the suit, after the reinstatement, remained on the docket twelve months before the trial.

Call, on the same side, in addition to the points urged by *Nicholas*, said it was no objection *now* to the allowance of *part* of *Littlepage's* claims, that such part had not been exhibited to the jury; that, if such an objection had been intended, it should have been *pleaded* in *abatement* to the suit at law; that, even if it be true, at *law*, that a judgment may be pleaded in bar of a subsequent suit for articles of a prior date to the first writ, it is not so in *equity;* substantial justice only being regarded there.

As to the case of rents, he observed that, if the acquittance for a *subsequent* year's rent is *under seal*, it is a bar to the claims for preceding years; but not otherwise:—however, the case of *taxes* is very dissimilar; since the taxes of different years are due to different sheriffs.

Where there is an honest debt *precedent*, and an usurious contract *subsequent*, although *that contract* is void, yet the plaintiff may recover the debt originally due. According to the same principle, if the agreement on which *Littlepage* relied was illegal, he has nevertheless a right to recover what was due previously to that agreement.

With respect to the taxes on *John Lipscomb's* estate, the practice of this country is that executors do manage

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the landed estate to a certain extent, and pay the taxes on them. This is a reasonable practice, and beneficial to orphans. The charging taxes to the executors is not *technically right;* but is conducive to the advantage of the estate; and, at any rate, the sheriff has a right to recover according to the charge in the commissioner's books.

The 5th exception answers to Addison's definition of nonsense. It cannot be confuted, because it has no point. "*Falsum in uno falsum in omnibus*" extends only to this; that, if falsified in part, the answer loses the weight *of being evidence.* In that case it is not necessary to disprove it by two witnesses: but still the complainant must prove his case.

As to the value at which the certificates ought to be rated, the certificate-tax was to be satisfied by a *specifick* paper, which, by the law of the land, the individual was required to pay. There is an important distinction between cases where there is a *contract* to deliver certain paper and where there is a *right* to the paper itself, independently of any contract.

Suppose a man, by will, bequeathed bank stock. At the time it ought to have been delivered by the executor, it was worth 3 for 1: but it afterwards rose in value to 17 for 1. Can the executor settle with the legatee at the rate of 3 for 1? He could not; because the legatee has a right to the specifick stock. The case is similar here: for the commonwealth (or the sheriff in its room) had a right to the *specifick* certificates, and, therefore, is entitled to recover according to the rise in value.

Randolph, in reply. I insisted that the court of equity had jurisdiction, and that there had been a surprise. I acknowledge the defendant ought to have adverted to the law; but the fact is he failed to observe it; and the clerk certifies that nobody appeared to defend him. The question is whether failing to observe *strict law* is to bar a remedy in equity. If the defendant had appeared and stood the chance of a trial, and then come into equity, the case would have been more against him.

Has a man a right to bring separate suits on every item in his accounts? In *assumpsit*, he must include all that is due. I do not admit Mr. *Call's* doctrine concerning *a plea in abatement* to be correct. It cannot be law that a defendant is compelled to admit the articles exhibited and plead latent articles. How could a man have pleaded in

abatement that the account comprehended all the dealings between the parties; which was what my client here insisted?

Judge TUCKER.—Where judgment is obtained, and another suit brought for items prior in date to the first writ purchased, the defendant may plead in bar.

Randolph. Such is my opinion of the law, and so Mr. *Call* ought to have taken it.

No man can be condemned to pay money where he has *discounts*, even though he *might* have claimed them at law. The only penalty upon him is to make him pay the costs in *chancery*, for his neglect *at law*. Many cases were decided at the late term of the Court of Chancery, where relief was given, yet the complainant made to pay the costs.

Judge ROANE. Has not the case of *Terrill v. Dick*, 1 *Call*, 546, settled that point?

Judge LYONS. Can a man be permitted to stand by, at a trial *at law*,—keep his receipt in his pocket, and afterwards go into *equity?*

Randolph—I have always thought *discount* a sufficient ground for going into equity.

Judge ROANE. There is always a reason assigned for not having made a defence at law.

Randolph—As to the certificates, nothing but their *value at the time* ought to be paid. This was only a case of a *contract*. The persons liable for the certificate-tax held not the *certificates* themselves. The sheriff agreed to purchase them, on their behalf, and pay them into the treasury. Therefore, nothing but the value at which he might *then* have bought them ought now to be claimed.

Littlepage's having mingled, in his account for taxes, private with publick claims shows they were all considered by him as homogeneous; and the whole ought to have been exhibited to the jury. This circumstance also falsifies the *answer;* for, in that, he says that he kept the accounts separate.

I admit that thereby the answer is only set aside *as evidence*. But, without the answer, there has not been

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evidence enough to support his claim. The commissioner's books are sufficient to show the amount of the taxes due from *Lipscomb;* but many other things of importance are proved by nothing but the answer.

Thursday, Oct. 29th. The Judges delivered their opinions.

Judge Tucker. *Littlepage*, a deputy sheriff, obtained a judgment in his lifetime against *A. Lipscomb's* administrator in the County Court of Hanover for the sum of £213 14 7½ to which the defendant obtained an injunction from the High Court of Chancery setting forth, among other things, that *Littlepage* had obtained a judgment against his testator in October 1790 for £12 19 3; that he paid one *Starke*, (who was a deputy sheriff with *Littlepage*,) for the years 1787, 1788, 1789, and 1790, £70 14 10, in discharge of taxes for those years; that, since his testator's death, *Littlepage* brought a suit against himself as administrator which was dismissed at rules, but, being afterwards reinstated on motion, a verdict was obtained on a writ of inquiry for £213 14 7½, without his knowledge, as he did not know of the reinstatement; that, had he not been surprised, he believes he could have satisfied the jury that nothing was due.

Littlepage, in his answer, states that he was a deputy sheriff in Hanover County from 1783 to 1789, both inclusive; during which years *A. Lipscomb* became indebted to him in the sum of £103 10 3½, for *specie* taxes, and £36 6 4½ for *certificate* taxes, as per account annexed to his answer, (which he prays may be taken as part of it,) on which account judgment for £213 14 7½ was rendered in his favour, for principal and interest to the time of trial, in July 1800;—denies the judgment was obtained by surprise;—says the judgment against *Lipscomb* in his lifetime for £12 19 3 was on an old private account; that his private account with *Lipscomb* and his account of taxes against him were kept separate;—"that the reason "was that the said *Ambrose Lipscomb* agreed with him, "that, if he would *grant to the said Lipscomb indulgence* "*for his taxes*, he would indemnify and save *Littlepage* "harmless by paying to him all such damages as the "commonwealth might exact of *Littlepage*, in case of his "delinquency in not paying up *within due time the pub-* "*lick taxes of the said County;* that, owing to this *cir-* "*cumstance*, and this alone, he waited, from time to time, "in expectation that *Lipscomb* would come forward and "faithfully comply with his engagement, &c." He an-

swers equivocally, or rather denies knowing whether any part of the money paid to *Starke* was on account of these taxes, though *Starke* expressly proves he showed him the account when he was preparing his answer.

That in 1792, or 1793, when his own property was advertised to be sold to satisfy the balance of the revenue due from him, *Lipscomb* gave the strongest assurances of relief; but *he never did* anything in his lifetime. He died, as the bill states, in 1794. The writ, in the suit on which he recovered, is stated by the clerk to have borne date July 12th, 1798. On the 20th of June, 1799, there was a nonsuit, for want of a declaration, which was afterwards set aside, and on the 18th of July, 1800, the verdict and judgment enjoined were obtained.

As the defendant had, in my opinion, a very clear defence at law; as the reinstatement of a cause, (which may be dismissed at the rules for want of a declaration,) at the next court, may be generally regarded as a matter of course; and, as that dismission was obtained by the defendant in person, he appears to me to have no excuse for not attending to the suit afterwards, especially as thirteen months intervened before the judgment was obtained. I therefore am of opinion that the grounds for granting the injunction, if any, were extremely slight. But, whatever defect there might be in the bill of the complainant, as a ground for the interposition of a court of equity, the answer of the defendant furnishes ample reasons for that court to relieve against a judgment, the foundation of which is not only without any *legal* basis, but is actually (if we may believe the answer,) bottomed upon a contract founded in *maleficio*.

Taking the defendant's answer to be true, as to the foundation and cause of his action, he could neither maintain a suit thereon at law nor in equity. Not *at law*, for several reasons which I shall consider somewhat at large.

The Act of Oct. 1782, ch. 8, for establishing a permanent revenue declares that the sheriff shall, from and after the first day of May, annually collect and receive from every person chargeable therewith the taxes imposed by that Act, in his county; and, in case payment be not made, on or before the first day of June, annually, the sheriff shall have power to *distrain* the lands, or slaves, goods or chattels, which shall be found on the lands, and in possession of the person so indebted or failing, notwithstanding they may be comprised in any deed, or mortgage: and, if the owner shall not pay the taxes within five days, the

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sheriff may lawfully sell the same, &c. And the sheriff shall duly account for and pay the same into the treasury, on or before the 15th of September, annually; and, in case of failure, he is made liable to a judgment on motion in the General Court for the amount of the taxes due, with fifteen per cent. damages, and five per cent. interest until paid. The provisions of this act, with some variations as to dates, are continued to the present period.

This Act both *creates the duty* and gives *the remedy*. The duty from the person chargeable with any tax is to the *commonwealth* not *to the sheriff*. The duty *from* the sheriff is *to* the commonwealth likewise. The remedy in both cases is the *remedy of the commonwealth*. Her *officer* the *sheriff* may distrain the lands, slaves, and goods of the person chargeable for taxes, for the amount thereof, BUT NO MORE. The court may give judgment against the sheriff for any *neglect of duty*. As the law creates no debt or duty, *from* the person chargeable with the tax, *to* the sheriff, he has no right of ACTION, in case of non-payment to him, but a right to distrain for them only, as the *officer of the commonwealth*, and in *her behalf*. And it may well be doubted, if he neglected to *distrain* WITHIN the period limited for him to account and pay into the treasury, whether he could even *distrain* at any future period, unless authorized by some special Act of Assembly for that purpose. The first Act that I have been able to discover giving such authority is that of 1789, c. 29, amended by that of 1792, Ed. 1794, c. 83, sect. 29, which, by a kind of negative pregnant, declares that no sheriff shall be allowed to *distrain* for any taxes, after two years from the time the taxes became due, except sheriffs appointed prior to the year 1792, who shall have the *power of distraining for the taxes* THEN *due* for the term of eighteen months from the passing thereof; which period was, by the Act of 1794, ch. 21, enlarged to the term of eighteen months from the first of October, 1793. Now, although this Act enlarges the *time* of *distraining*, it does not *change* the *remedy*. The taxes due from individuals can be collected in no other way; and I take it to be clear law that where a statute not only gives a remedy *but creates the duty*, no *other* remedy can be had. *Littlepage*, under the operation of these two last Acts, might have *distrained* for all arrears of taxes, which he asserts to have been due to him, until the last day of March 1795. After that period, if, through neglect, he failed to collect them, he had no remedy either at law or in equity, unless some

other Act of Assembly (which I have not been able to find and which I do not believe to exist) has given one. The Court before whom the writ of inquiry was executed ought not to have suffered his account to have gone to the jury. They were *ex officio* bound to look into it by the Act of 1792, Ed. 1794, ch. 92, sect. 56, and not only to have rejected it from going to the jury, for the reason already given, but to expunge from it every item that had appeared to have been due five years before the death of *Lipscomb*, which would have extended to the *whole account*, even including those years for which the taxes most clearly appear to have been paid. Thus I take it to be clearly proved that *Littlepage* could not have maintained an action at law upon this account, although the commissioner (of whose legal talents I never before had any opportunity of forming any opinion) is pleased to inform us in his report that *his claim is one of the first dignity.*

Nor do I conceive that *Littlepage* could have been more successful in a Court of Equity. His application to such a Court for its aid ought to have been founded on a fair contract between himself and *Lipscomb.* But what is the contract alleged in the answer? "If, contrary "to the duties of your office, you will not compel me to "pay my taxes to the commonwealth, I will indemnify "you for any damages that may be awarded against you "for such a breach of duty." A contract more flagrantly founded in *maleficio* never was brought to the view of any Court.

It is destructive of the revenue, ruinous to all publick creditors, pernicious to the publick credit, and fatal to the energies of the commonwealth, under the greatest emergencies. The record accordingly exhibits a series of judgments against the high sheriffs for whom he acted for upwards of £ 19,500, an evil of sufficient magnitude to show the pernicious consequences of such illegal and nefarious contracts; if, indeed, such a one ever was made on the part of *Lipscomb*, of which there is no proof whatever. No Court of Equity that understood even the elements of its functions could sustain a suit founded on such a contract.

But, let it be supposed that I am mistaken upon this point, and that *Littlepage* might have maintained an *action* for the taxes, and that the Court ought not *ex officio* to have striken out all the charges alleged to have been due five years before *Lipscomb's* death; even in this case, he

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ought to have recovered much less than he did, or nothing at all. In the account, which is annexed to his answer, and is that I presume, which appears in the record, page 33, he charges *Lipscomb* with £ 103 10 3½ for the specie taxes due from him from the year 1783 to 1789, both inclusive, and £ 36 6 4½ for the certificate taxes for the same period; in the whole £ 139 16 8. In this account there is a credit for £ 16 5 0 paid in warrants, corn, &c. It is in proof that *Lipscomb* settled with *Starke*, a deputy sheriff who acted for *Littlepage*, for all the taxes due for the years 1787, 1788, and 1789, amounting to £ 39 6 3, and paid him for the same in August 1793; of which payments being made on that account *Littlepage* in his answer expressly denies knowledge; though *Starke* proves he showed him the account, at the very time that he was penning this falsity in his answer; with this additional circumstance, that, "after showing him the account, Capt. *Street*, who "was present, remarked (addressing himself to *Littlepage*) "that it would be proper to admit a credit for those cre- "dits; when *Littlepage* replied *that he should admit nothing* "*but what they could* prove." What credit can be due to the answer of such a man? The falsity of it being proved in this respect, and the payment of these taxes for the *three last years* being also unequivocally established, is it probable, or even conceivable, if the taxes for the years 1783, 1784, 1785 and 1786 had been still due, that *Littlepage* would have suffered his own property to have been sold under execution in 1793, rather than to have distrained for those arrears, as the Act of 1792 gave him a right to do? On the contrary, is there not the strongest presumption that the taxes for those years had been previously settled and paid, and that the payment to *Starke* was in full of all arrears? The inference, I confess, is so strong to my apprehension that I cannot reject it; more especially when fortified with this additional circumstance, that *Littlepage*, not long before *Lipscomb's* death, brought a suit against him, and recovered £ 12 19 3 only; which proves there was not such a good understanding between them as to prevent a suit, and that this suit was instituted some time after his death. To this I will add another circumstance appearing on the face of the record. On the 24th of march 1795, *Littlepage* instituted his first suit against *Lipscomb's* administrator, laying his damages to *one* hundred pounds only. Upon this suit he was nonsuited in October 1797, and, in July 1798, he instituted the suit on which he afterwards recovered, and laid his da-

mages to *four* hundred pounds. By what circumstance his damages against a dead man could be quadrupled, in so short a period, it is difficult to imagine. It shows, however, that for more than two years, he estimated his claim against *Lipscomb's* estate at less than one half of what he actually recovered. Even upon these grounds, I conceive the present jndgment should be perpetually enjoined; and that the most favourable decree for *Littlepage's* representatives ought to be to direct an issue to be made up between the parties to determine whether the taxes due from *Lipscomb* from the year 1783 to 1786 both inclusive, have been satisfied and paid, or not; and further, what was the current value of the certificates proposed to be redeemed by the certificate-tax, at the several periods when the taxes payable in certificates became due; and that verdict to be certified to the Court of Chancery. But should the court be of opinion, that they ought not, for the reasons first given, to perpetuate the injunction as to the whole judgment, nor to direct such an issue as I have proposed, but to make an end of the case here; upon the principle that a Court of Equity will not interfere to deprive a plaintiff at law of any legal advantage which he may have gained, unless the party seeking relief will do complete justice by paying what is really due;(*a*) and that they have even gone so far, upon the same principle, as to refuse their assistance in relieving against a judgment *obtained by fraud;* although I think I could show a difference between fraud in OBTAINING a judgment and a judgment *founded* IN *fraud* or *maleficio*, as I think the present was;—my opinion, in that case, will be, that, rejecting the commissioner's *liberal* allowance of the certificate-tax for 1783 and 1784, and the specie-tax for 1785 on *John Lipscomb's* estate, not mentioned in the account annexed to the answer, nor claimed therein, and also rejecting his allowance of interest upon the taxes for 1783, 1784, 1785, and 1786, which ought not to be allowed, because those taxes might have been distrained for, (were there no *official turpitude* in the contract *pretended* but *not proved*, in *Littlepage's* answer, as a further reason for rejecting interest,) a decree ought now to be entered for £ 84 5 5, (the balance appearing to be due, upon the account of taxes exhibited and annexed to the answer, after allowing the credits admitted and proved as beforementioned,) with interest thereon from the time of granting the injunction to the time of pronouncing the decree; and that the judgment be perpetually enjoined for the balance.

(*a*) *Paine* v. *Dudley*, 1 Wash. 199.

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Judge ROANE. This is an injunction to stay proceedings on a judgment obtained in Hanover Court by the intestate of the appellee against the appellant's intestate. That judgment was regularly obtained. The allegation of surprise, even as stated by the appellant himself cannot regularly avail him, for no man is to plead in excuse his ignorance of the law, or of the rules of the Courts; but, in this case, there is, on the contrary, the answer of the defendant and some other testimony going to show that the appellant's intestate was duly apprised of the continuance and existence of the suit. On the ground of surprise, therefore, I should be of opinion to overrule the appellant's pretensions: but the appellee's intestate having in effect admitted that the taxes of 1777, 8, and 9, were unjustly included in the judgment; having also shown this to be the case by the testimony of *T. Starke*, whose evidence is very strong against him on this point; and having submitted it to the court to make an abatement in respect of those taxes, if it should appear to the Court of Equity that they had been unjustly recovered; on these grounds I presume that the Court of Equity had obtained a fair cognizance of the case, and might go on to adjust the judgment according to the principles of equity.

As this case existed in the trial at law, there is nothing of turpitude or illegality of consideration tending to impeach the items of which the account filed in that action was compounded. It is principally composed of debits for taxes long since due to *Littlepage* the legal and proper collector;—I say due to him, (though not for his own benefit,) because he alone had a right to receive them, to take his commissions thereupon, and grant discharges for them; and, for anything that appeared in the trial at law, it was a fair contract, on the part of the sheriff, to pay the taxes of the appellant's intestate to the publick, and indulge him therefor a considerable time; which circumstance, and, especially, the forbearance would undoubtedly operate a consideration amply sufficiently whereupon to found a recovery. Admitting, also, in this point of view, that the right of distraining for these taxes had expired, it does not follow that an action for the amount thereof, as for so much money advanced for his use, would not have been justly sustainable against the appellant's intestate. We are not to say in this court that every thing was not shown in the trial at law which was necessary to support the action on the part of the plaintiff. In the naked case, therefore, as existing in the trial at

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law, there is nothing to impeach the fairness of the contract. The court of law was as competent as a court of equity to relieve against, or rather to refuse to enforce the performance of an illegal contract: but when that is not done by the law-court; when this ground has not even been taken by the defendant in that court, but, on the contrary, a regular judgment has passed against him, appearing on the face of the proceedings at law, to be free from any vitious consideration, and the defendant comes here to get relief against that judgment on another ground; by what rule ought the Court of Equity to be governed in extending to him its relief?

Admitting then that the contract, which is *first stated* in the answer of the appellee's intestate, respecting the indulgence to be granted to the other party, was one contrary to the policy of the laws, and founded on considerations which would not be enforced by a court of justice; yet I hold it to be an established principle of equity not to disturb a regular judgment at law, unless the party praying to impeach it will do on his part what justice requires to be done.(*a*) The only question, therefore, for us to decide at present is how much is really due (throwing the consideration of the contract entirely out of the question) from the one party to the other.

(*a*) See the case of *Payne* v. *Dudley*, executor of *Fleet*, 1 Wash. 196.

In making this inquiry I have taken up the commissioner's report, and approve the same, except as it is now objected to.—1st, I object to the report, so far as it inserts the certificate-tax on *John Lipscomb's* estate for 1783 and 1784, and the specie-tax on the same for 1785; since these were not claimed in the action at law.—2dly, I object to the price at which the certificates are rated, and think their values at the respective times when payable into the treasury with interest should only be allowed. The contract as to the certificates was either a purchase of so many certificates in the hands of the sheriff for which their *then* values with interest were agreed to be paid; or, as it now seems from *Littlepage's* answer, a contract of indemnity to *Littlepage*:—and, if the latter, he should not, when he, perhaps, has paid the commonwealth at the rate of 5*s* in the pound, now recover them at par, with legal interest:—this would be a contract on speculation, and not a mere contract of indemnity.

With these variations, I approve of the report; and, when the account shall have been reformed pursuant thereto, I am of opinion that the injunction be perpetual, as to the credits thence arising to the appellant (in addition

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to those already produced by the report,) and be dissolved as to the balance.

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Judge LYONS concurred with Judge ROANE; Judge FLEMING being absent.

The opinion of the court therefore was, that the decree should be reversed, and the cause remanded to the Court of Chancery for farther proceedings.

Saturday, October 17th.

If, on an issue joined on the plea of *plene administravit*, the jury find assets to a certain amount less than the plaintiff's claim, judgment ought to be entered for that amount only, (for which execution may issue immediately) and for the balance, when assets shall come to the defendant's hands.

NIMMO, Executor of WISHART *against* THE COMMONWEALTH.

This was an appeal from a judgment of the General Court. Several points were made in argument; but the only circumstance on which the decision of this court was founded, was that the plea having been "*plene administravit*" the judgment was entered against the appellant, as executor of *Wishart*, for the whole amount of the debt, which was £1368 2 0; although the jury found that the assets in his hands amounted to the sum of £482 13 0 only. For this defect it was reversed; and this court, proceeding to give such judgment as the General Court ought to have given directed that the commonwealth *should have execution* (the judgment being on a *scire facias*) for the said sum of £482 13 0, with interest and damages thereupon according to law, and the costs which accrued in the General Court; and for the farther sum of £885 9 0, with interest and damages thereupon, when so much of the goods and chattels of his testator should come to the hands of the appellant to be administered.

Tuesday, Oct. 20th,

A suit cannot be maintained, in the name of an attorney in fact, even in

JONES *against* HART'S Executors.

This suit was brought on the chancery side of the County Court of Rockingham by *David Jones*, the appellant, as attorney in fact for the *Philadelphia Baptist Association*, for the purpose of recovering of the appellees, the executors of *Silas Hart*, a legacy bequeathed, as he al-

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leged, by their testator to the said Association. One of the clauses of the will, under which the claim was exhibited was in the following words; "Item, what shall remain "of my military certificates (now funded at Richmond "agreeable to an Act of Congress) at the time of my "decease, both principal and interest, I give and bequeath "to the *Baptist Association that for ordinary meets at Phi-* "*ladelphia annually*, which I allow to be a perpetual fund "for the education of youths of the Baptist denomination "who shall appear promising for the ministry, always "giving a preference to the descendants of my father's "family."—Another clause was the following; "After "my just debts, funeral expenses, and legacies by me "bequeathed be fully paid, what shall remain I give and "bequeath to the association beforementioned, and for "the same purpose as the other."

The power of attorney produced by the complainant was signed by *Samuel Jones* as president, and *William Rogers* as secretary of the trustees of the *Philadelphia Baptist Association*, and authenticated by a certificate from *Thomas Mifflin*, Governor of Pennsylvania, with the seal of the State annexed stating that those persons were, at the time of subscribing the same, and now are, the former, president, the latter, secretary, of the said board of trustees, "*A body corporate, in law, and in fact, in the said commonwealth appointed.*"

There was no statement in the bill that the Baptist Association was a body corporate. The answer of the executors denied the corporate existence of the association, and put it upon the plaintiff to prove every thing requisite to show that they were entitled to receive the legacy. No farther evidence was produced; and the cause coming on to be heard upon bill, answer, and exhibits, the bill was dismissed with costs. The plaintiff appealed to the Superior Court of Chancery for the Staunton District, where the decree was affirmed; from which affirmance the plaintiff appealed to this court.

For the appellees it was contended,

1st, That there being no evidence of such a corporate body as the Baptist Association, in Philadelphia, and there being no *individual* named in the bequest, the bequest itself was void:

2dly, That if the bequest was not void, yet there was no evidence to show that the trustees of the association who authorized this suit, were the trustees of the association to whom the legacy was given: and

a court of equity.

Quere. is a bequest of *personal estate* "to the Baptist Association that for ordinary meets at Philadelphia annually, to be a perpetual fund for the education of youths of the baptist denomination, who shall appear promising for the ministry, always giving a preference to the descendants of the family of the testator's father" sufficiently definite and certain to be carried into effect?—Can a society incorporated under the name of the Trustees of the *Philadelphia Baptist*

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3dly, That the plaintiff had shown no right to maintain a suit in his *own name*.

Association claim, by virtue of that bequest, without proving that they were actually incorporated at the time of the bequest, and that they are the same society intended by the testator?—

Randolph, for the appellant contended—I, That the 1st and 2nd objections were overthrown by the evidence; for that the existence of such a body corporate as the Baptist Association in Philadelphia was sufficiently proved by the certificate of *Thomas Mifflin* Governor of Pennsylvania, which is the proper mode of authentication under the Act of Congress and our own Act of Assembly; that, although no *individual* was mentioned to whom the devise was made, the executors were trustees to preserve the estate: but, if there were no trustee, where a trust exists, the Court of Chancery will appoint organs for its execution; that, even if they were not *incorporated*, the assembly of Baptists would take; the bequest being of *personal* estate only. *Kydd* on Corporations says a devise of *real* estate cannot be made to an association unless it be incorporated; and *Coke* says, "a *devise* to the parishioners of Dale" is void: but these doctrines do not affect *personal* estate: II, That the 3d objection was merely technical. The bill was in the name of *David Jones* as attorney in fact; but its whole object was stated to be for the benefit of the association. At *common law*, this objection might be fatal; but not in *equity:* even a plea in abatement would not lie. His suing in his own name was more beneficial for the defendants, because he was thereby made responsible for the costs. I know of no instance of a bill in chancery dismissed for such a defect. At any rate, the bill should be dismissed without prejudice. If the principal point, concerning the bequest is decided in our favour, we shall be satisfied; for we believe the executors would then pay the money.

Chapman Johnson, for the appellees.—Mr. *Randolph* is right in his last assertion, and in that only: but we trust, that the court, considering the costs are in question, will not reverse the decree, if they think the third point is for us.

The Act of Incorporation ought to be shown. But, even if the Governor's certificate were sufficient to prove the corporation, it does not show whether they were incorporated *at the time when the will was written*, or *since*.

If sufficiently described, they might take in their *natural* capacities; but here the persons are uncertain, whether

associators in Philadelphia, in Pennsylvania, in the United States, or in the world.

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If there was evidence that a certain association known by the name used in the will existed in Philadelphia, it would be sufficient: but of this there is no evidence; and the "*Philadelphia Baptist Association*" might be a very different body from the "*Baptist Association which for* "*ordinary meets annually in Philadelphia.*"

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The association itself are only *trustees;* and the *cestuis que trust* are still more uncertain; the description of persons entitled to claim the benefit of the bequest being so vague and indefinite that, if a youth of the Baptist Society were before you as a complainant, you could not tell whether he was entitled to have any part of the money applied to his use or not.

Mr. *Randolph* says there is a difference, as to the right of *David Jones*, as *attorney*, to sue in his own name, between a suit in *equity* and at *common law*. But what reason is there for this distinction? *David Jones* is not the proper person to receive the money; he might recover, and never pay it to the association. There was no necessity for a plea in abatement, because the plaintiff's *right of action* was denied.

Stuart, on the same side.—1, There must be a corporate body to be authorised to take under the terms of the will now in question. And, if there was no such body, even if there were trustees designated by name to preserve the devise, it would not be sufficient; because in their *natural* capacities they could not preserve it *forever*.

The Governor's certificate is not sufficient to prove the fact in dispute, because he had no right to decide whether in law they were a corporation, but only to authenticate the instrument by which they were incorporated. Why is not that instrument produced? When it is considered that the Governor's certificate was exhibited with the bill, and that the answer denied the fact of incorporation, and demanded proof; its not being produced is presumptive evidence against the fact.

2. The intention of the testator is so doubtful that the devise is void. In the will the word "Philadelphia" is used as descriptive of the place of meeting only. The "Philadelphia Baptist Association" appears to be composed only of the citizens of Philadelphia. The "association meeting at Philadelphia *annually*" are probably

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people living at a great distance, and may be citizens of Pennsylvania, or of the United States, generally.

This is a bequest of a trust. The trustees ought therefore to be designated.

In *Powell on Contracts* p. 418, a devise to twenty of the poorest of the testator's kindred is said to be void for the uncertainty.(*a*) Here it is for the use of the most deserving young men of the Baptist Society! How is this to be ascertained?

(*a*) See also Ib. p. 336.

Where a devise is to "his son" and he has two sons, or to his son *John*, and he has two sons by the name of *John*, it is also void.(*b*)

(*b*) Ib. p. 424.

(*c*) 1 Vern. 362, *Hucksteep & Matthews.*

2 Bac. Abr. 85.(*c*) A. devised lands to trustees in fee, in trust to pay debts, &c. and, after those debts paid, then to sell; and, if any of the testator's name would buy, such person to have the lands £ 200 less than the value. This devise was declared to be void; for, if two of the testator's name should claim the benefit, who must have it? So, here, I say, another Baptist association meeting annually at Philadelphia may claim.

Randolph, in reply, observed that there was no uncertainty in the persons who might be entitled to receive the benefit of the provision; that this could easily be ascertained by the managers, whose business it was;—that, as to the Act of Incorporation, he believed that corporations might be created in Pennsylvania by the *executive;* and therefore, it was sufficiently authenticated in this case. He argued that it was not necessary to show a corporation *existing at the time* of the devise. Wherever a sum of money is given to produce a particular effect thereafter,—as for a college when founded;—the college when afterwards founded may take. Here it should be understood that the legacy was given upon a condition that a corporation qualified to take should exist while the money should remain in the hands of the executors, and the corporation, if not existing at the time, was shortly afterwards created.

The case of *Pleasants v. Pleasants*, 2 Call, 319, was somewhat similar to this. There certain negroes were to be emancipated *when the law would permit*, &c. and, a subsequent law having passed authorizing emancipation, the devise was decreed to take effect.

2 Bac. Abr. p. 6, it is said that "in devises, if the name of a corporation be mistaken, yet, if there be words sufficient to show the meaning, it will be sufficient. There are a number of Baptist associations in this State: but that in Philadelphia is sufficiently described. But the *answer*

does not dispute the *identity* of the association; but only requires proof of the incorporation. The *identity* is therefore not put in issue. Besides, the words are the same in substance.

In fact there is no difficulty in this cause, except that concerning the right of *David Jones* to sue *in his own name*, which is merely a question of form, and not of substance. If the court should be of opinion that the *devise* is not good, they will dismiss the bill; if otherwise, they will direct *proper parties* to be made. But it is said that he is not the proper person to receive the money. To obviate any difficulty on that score, this Court may *specially* decree, so that the Baptist Association only could get the money, since it appears on the record that the suit is for their benefit.

Judge LYONS. May they not revoke the power of attorney? If he dies, and the decree is in his name, are not *his executors* to have the benefit of it?

Judge TUCKER. Why did not your clients show, from the identity of their description, that no other persons were authorized to take?

Randolph. This is a matter which depends on the general history of that society,—and *general* history we have a right to refer to. Besides the identity is admitted in the answer.

Judge TUCKER. The answer puts you upon the proof of every thing.

Saturday Oct. 24th. The Judges delivered their opinions.

Judge TUCKER. This was a bill brought by *David Jones* attorney in fact for the President and trustees of the "*Philadelphia Baptist Association*" to recover a legacy bequeathed by *Silas Hart* "*to the Baptist Association that for ordinary meets in Philadelphia annually.*" The executors admit the legacy, but say that they "do not think "it safe to pay the same, inasmuch as it has never been "shown that the Baptist Association was at the time of "making the will a corporate body; on the contrary, "they believe it was not incorporated, either at the time "of making the will, or of their testator's death, and call "for proof." None is produced as to this point. The court dismissed the bill.

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Without deciding whether the constituents of Mr. *Jones* have proved themselves to be the objects of the testator's bounty, or not, since it is possible that some other Baptist Association, that *ordinarily meets in Philadelphia annually*, might contest that point with them, I am of opinion that the bill cannot be maintained in the name of an attorney in fact, even in a Court of Equity. The common case of the assignee of a bond in England, who must, even when he has an irrevocable power of attorney, sue in the name of the obligee, sufficiently proves this I conceive.

My opinion therefore is, that the decree of dismission be affirmed, without prejudice to any right which the constituents of the appellant may have.

Judges Fleming and Lyons concurred.

The decree was therefore affirmed, without prejudice.

Temple *and* Taylor *against* Temple.

Wednesday, October 23d.

The controversy in this case was, whether a writing purporting to be the last will and testament of *Richard Squire Taylor*, late of King William County, was his last will and testament or not. It was exhibited for probate in the County Court, on Monday, the 27th of October 1806; and (there being no *subscribing* witness) was proved by *two* witnesses to be as they believed, altogether in the hand writing of the said *Taylor;* whereupon sundry witnesses were sworn and examined, and other evidence heard touching his competency to execute a will; and the court, being of opinion that he was not of sound mind and memory at the time the said instrument of writing was executed, refused to admit it to record. On an appeal to the District Court holden at King and Queen Court-house, the transcript of the record of the decision aforesaid, as well as the original writing aforesaid, being seen and inspected, and divers witnesses sworn and examined, the decision was reversed, and the will admitted to record; from which judgment an appeal was taken to this Court.

The circumstance that a writing, exhibited for *probate*, as a last will and testament, was wholly written by the testator himself, is *prima facie* evidence that he was in his senses, and able to make a will, at the time of writing the same; so that the *onus probandi*, to repel that presumption, lies on those who wish to impugn it.

The evidence before the Court of Appeals (where a number of witnesses on both sides were examined *viva voce* and the original will was also produced,) was various and contradictory, as to their opinions concerning the state of *Richard Squire Taylor's* mind towards the close of his

In such a case, proof

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life; particularly, about the time when the writing was dated: but it was clearly proved by three witnesses, that the whole *was written and signed by himself.*

Many objections were made, in argument, to the *tenour* of the writing itself as proving that he could not have been in his senses when he wrote it; many passages being ungrammatical and incorrect, notwithstanding he was once a man of good sense and skilful in business; a part of his property not being mentioned at all; and some bequests of a strange nature occurring; among which was one, in which he gave a part of his horses and *cattle* to his daughter *Elizabeth Meux* and a part of his *sheep* to *James Meux* her husband. From this it was inferred that his intellects were impaired, to such a degree, that he was not capable of rationally disposing of his property; since he appeared to have forgotten that a wife could not hold (without the intervention of a trustee) a separate estate from her husband, in personal property. As the arguments of counsel consisted chiefly of endeavours to invalidate or maintain the credibility of the witnesses; of criticisms (on one side) on the inaccurate language and omissions in the will; and of attempts (on the other,) to repel the effect of those objections; they cannot be more minutely inserted, consistently with the plan of this work.

that the testator's intellects were greatly impaired by the use of opium and ardent spirits, and that in consequence thereof, he was frequently incapable of business, is not sufficient to repel the presumption without proof that such was his condition *at the time when the writing was executed.*

Saturday Oct. 24*th.* The Judges delivered their opinions.

Judge TUCKER. It having been proved to this court by the evidence of three credible and respectable witnesses, who were well acquainted with the deceased, *Richard Squire Taylor*, that the paper-writing exhibited in this court, purporting to be the last will and testament of the said *Richard Squire Taylor*, was wholly written by himself, that circumstance, *prima facie*, amounts to presumptive proof of his deliberate intention and capacity to make a will at the time of writing the same: and neither the testimony of the witnesses examined in this Court, touching the mental debility of the testator for a considerable period before his death, and before the date of that will, nor any internal evidence arising from the will itself, appear to me sufficient to repel that presumption, and to set aside the will on the presumption of the testator's incapacity to dispose of his estate at the time of making the said will. I am therefore of opinion that the judgment be affirmed.

Grammatical inaccuracies, want of knowledge of points of law, or omission of part of a testator's property, are not circumstances sufficient to vitiate a will.

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Judge FLEMING. A great number of witnesses have been examined on this occasion, all of whom seem to be men of respectability, and worthy of credit, though there is some difference in opinion among them respecting the state of the testator's mind towards the latter part of his life; particularly, about the time of his making his will: but, from the general tenour of their collected testimony, it appears that he was once a man of sound understanding, well acquainted with business, and of exemplary moral character; that, from family misfortunes, and the loss of an affectionate wife, and of his eldest son in his advanced age, he became dejected and melancholy, and was apt to make an imprudent use of opium and of ardent spirits, by which means his intellects were greatly impaired; and that at particular times, when he indulged himself in too free a use of spirits, he was incapable of business, but, at other times, when he abstained from the use of strong liquor, and kept himself cool, he was able to transact business with tolerable accuracy. It appears, however, that some of the witnesses were mistaken when they gave an opinion that, after the misfortunes in his family, he was incapable of writing two lines with tolerable correctness, when it appears that, in May 1805, about five months before the date of his will, he wrote a letter to Mr. *Robert Temple* on business of importance with as much propriety and perspicuity as he, perhaps, ever could have done at any period of his life; and the will itself, (which is proven by three respectable witnesses to be wholly in his own hand writing) though not technically correct, is sufficiently so to evince that those witnesses were very much mistaken: and, although the whole of his estate is not thereby disposed of, the most material and valuable part of it is given to different members of his family; and in such a manner too as he had often been heard to declare he intended before his understanding became impaired.

It is also in evidence that, in the Summer of 1806, eight or nine months after the date of his will, when, from the circumstances before stated, his mental powers may be supposed to have been still on the decline, he conversed with some of the witnesses very sensibly on different subjects, and particularly on that of his having altered his will after the death of his son *Richard;* that, in June, 1806, he executed a deed to Mr. *Meux* for a tract of land which the latter had purchased of *Richard Taylor*, Jr., the title being in himself and not in the said *Richard*, which deed was recorded in the County Court of King William; and,

in July following, he settled with Col. *T. Tinsley* a long account of several years standing with propriety and accuracy. OCTOBER, 1807.

These circumstances induce me to concur in opinion that the testator was competent to make a will, and that the judgment of the District Court ought to be affirmed. TEMPLE *and* TAYLOR *against* TEMPLE.

Judge LYONS concurred; and the judgment was unanimously affirmed.

BRANCH, BAKER, GRAVES and *others*, Inspectors of Tobacco, *against* The COMMONWEALTH. *Monday, 2nd Novemb.*

Inspectors of tobacco are entitled to an allowance of *fifty* dollars for each hand, *over two*, kept, by virtue of an order of court, as labourers at their warehouses.

These were three cases of appeals from decisions of the General Court. The appellants, who are inspectors of tobacco at *Johnson's*, *Trent's* and *Manchester* warehouses, had, in the settlement of their accounts with the auditor charged the commonwealth with the hire of the number of labourers which had at their respective warehouses, been allowed by the County Court of Chesterfield, at one hundred dollars each, and retained the amount out of the surplus on tobacco exported. The charge was disallowed by the auditor, from whose decision an appeal was taken to the General Court, where the claim was also disallowed, and judgment rendered in favour of the commonwealth for the full amount of the monies in the hands of the inspectors. From these judgments appeals were taken to this court.

Wickham, for the appellants. The sole question is, whether inspectors of tobacco are allowed to retain any money for the services of hands which they are required to keep by the County Courts. The order of court on which these charges are made expressly directs that four labourers shall in future be kept at each of those warehouses; and the law is explicit in authorizing the courts to make such direction. Rev. Code, vol. 1, ch. 135, sect. 16, pa. 259. "And the inspectors, at each of the warehouses es-"tablished by this act, shall constantly keep so many able "hands, at their respective warehouses, as the Courts of "the several counties, wherein they lie, shall from time to "time judge necessary and direct, for the purpose of "taking care of all tobacco brought to such warehouse, "and stowing it away after the same shall be inspected "and stamped." Under this clause of the law, the Court

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of Chesterfield County directed that four hands should be kept at each of those warehouses for the purpose pointed out by this act. By the 25th section of the same law (page 262) all inspectors are directed to account for, upon oath, and pay into the publick treasury "all monies "received by them, by virtue of their offices, except the "money paid for nails, and for their trouble in prizing, or "for repacking damaged tobacco, which shall be relanded "at their inspections, for every hogshead of transfer to-"bacco; in which account they shall be allowed their "salaries, the rents of the warehouses, *and all other neces-"sary disbursements in pursuance of this Act.*" At the session of 1805 an Act passed,(*a*) which makes it the duty of every inspector, under severe penalties, to stow away and secure at night every hogshead of tobacco inspected during the day. This duty cannot be performed without a sufficient number of labourers; and, in these cases, the Court having directed the number of labourers pursuant to law, their wages are to be considered as *necessary disbursements*, and the inspectors are clearly entitled to retain for the amount.

(*a*) See Acts of 1805, ch. 70, sec. 2, p. 41.

The Attorney General, for the commonwealth, observed that this was the first instance in which a claim had been made by inspectors of tobacco for compensation on account of the hire of labourers; and that circumstance alone furnished a strong ground to believe that the allowance was never contemplated by the legislature. He took a comprehensive view of the several sections of the act of 1792,(*b*) from which he argued, that, these sections prescribing a general duty to inspectors and providing a general compensation, no other could be given, unless expressly allowed by law. All incidental expenses must be presumed to have been included.

(*b*) Rev. Code, vol. 1, ch. 135.

That part of the 16th section which directs, that the inspectors shall keep so many hands as the County Courts may direct, was inserted merely by way of precaution to guard against the possibility of their not keeping a sufficient number to do the publick business. But if it had been the intention of the legislature to make compensation for those hands out of the publick treasury, they would have prescribed the amount of the compensation. This has been done in every other part of the law where a compensation was intended to be given. It is observable too that the legislature is particularly guarded in designating those cases

in which the State shall be liable; thereby manifestly intending to exclude all others

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The 25th section, it is admitted, directs that the inspectors shall be credited by the rents of the warehouses, nails, &c, *and all other necessary disbursements;* but these disbursements must relate to the mere incidental expenses of stationary and other items of an inconsiderable amount. It never can be imagined that the legislature would particularly mention *nails* as an article for which the inspectors should be entitled to a credit, and omit such an important item as the hire of labourers. Again: if they had intended that an allowance should be made for labourers, they certainly would have stated the amount, and not have left it to the arbitrary discretion of the inspectors. Suppose an inspector should charge 2 or $300 for a hand, how could the auditor settle the account? It would be impracticable. He cannot settle accounts according to equitable principles, but must be guided by positive law.

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Wickham, in reply. This case lies within a very narrow compass. The only inquiry is whether the expense of employing those hands is to be paid by the inspectors out of their own money, or be chargeable to the commonwealth under the general provisions of the law concerning disbursements. Is not the labour of hands as much a disbursement as stationary, &c. and as necessary a disbursement? We are consequently to be allowed for their hire in the settlement of our accounts with the treasurer unless some other clause of the law can be found prescribing a different mode. The law being imperative, that the inspectors shall keep a certain number of hands, it follows of course that they shall be paid for them.

Tuesday, November 10th. The Judges* delivered their opinions.

Judge TUCKER. The only question in these cases, is, whether inspectors of tobacco have by law a right to charge the commonwealth for the hire of *labourers* employed by them in the warehouses for the purpose of taking care of, and stowing away tobacco brought there to be inspected, pursuant to orders of Chesterfield Court, made under the 16th section of the tobacco law; edit. 1794, ch. 135, which directs, "that the inspectors shall constantly keep so many

* Judge LYONS was absent the remainder of this term, having been prevented from attending by indisposition.

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" able hands at their respective warehouses, as the courts " of the counties wherein they lie, shall judge necessary, " and direct, for the purpose of taking care of all tobacco " brought there, and stowing it away after it shall be in- " spected and stampt;" or whether the recompense for the labour of the hands so employed is supposed to be comprehended under the inspectors' salaries.

By the Act of 1764, ch. 4, sect. 49, edit. 1769; for the better detecting inspectors who shall not do their duty, any two justices of the county are empowered to visit the publick warehouses in their county, and if they should discover any negligence in the inspectors either in securing the tobacco, or stowing the same away; *or that they do not keep a sufficient number of hands for despatching the business*, or do not attend, &c., or are guilty of any *other breach* of their duty, the justices shall certify the Governor and council thereof, and, if any inspector shall be adjudged guilty of a breach of duty, he shall be removed from his office and incapacitated. Here then it appears that it was the inspector's duty, forty years ago, and upwards, to keep a sufficient number of hands to perform the very duty, which it is now contended is an additional one, under the Acts of 1796, ch. 12, and 1805, ch. 70. No allowance for those hands was made by that Act. Two years after, 1766, ch. 14, sect. 16, edit. 1769, directs that the several courts of the counties therein mentioned, of which Chesterfield is one, shall annually limit and direct *what number* of hands shall be kept by the inspectors as well for turning up, opening, and securing all tobacco brought to their warehouse, as to discharge the *other business* required to be done by such inspectors, and that the inspectors shall constantly *keep the number of hands so limited*, and shall open, view, and secure all tobacco brought to their warehouses, *as soon as the same can reasonably be done*, under penalty of 25*s* for every neglect; and shall be respectively allowed in their accounts £15 annually, for each hand so limited, and by them employed *above the number of two*. The only difference between the duty imposed by this Act, and that of 1805, is, that this requires the tobacco to be secured as soon as it can *reasonably* be done, and the latter requires it to be done regularly *every* night, which the law fixes as a *reasonable* time. The Act of 1783, ch. 10, edit. 1785, limited the number of hands to be employed by order of court to two, without making any allowance for their labour. The Act of 1792, ch. 135, sect. 16, before noticed, does not limit the number,

nor make any allowance. But under the provision contained in the Act of 1766, ch. 14, (although I entertain some doubts whether that Act can be considered as in force) I think we may *venture* to pronounce that the allowance of £15 per annum ought to have been made for *all above two*, that were directed by the court to be employed by *Graves & Goode*, and as no more than two were directed to be employed by the other inspectors, I think the judgment of the General Court right in those cases. Whether the legislature, on application to them, may think the law a hard one, and alter it, must be submitted to them. But this court, I conceive, can go no further than make the allowance I have mentioned; the allowance for two hands, being, as I understood the law, comprehended in the inspectors' salaries. And in this opinion I am further confirmed by looking into the Acts of 1730, ch. 3, and 1732, ch. 9, sect. 10, which I had not till this morning an opportunity of consulting.

Judge ROANE. By the original inspection Act of 1730, (see edit. of 1733, sect. 33, p. 430,) each inspector, (of whom the tenth section of the said Act had provided that there should be *three* at each warehouse,) was entitled to receive from the publick £60 per annum.

This salary, *then* a very considerable one, was declared to be as well in consideration of "*necessary expenses* as the trouble" of the inspectors. By the same Act, sect. 36, the disbursements to be allowed to the inspectors, are restricted to those for "*nails and printed notes and receipts;*" which idea is also kept up in the 37th sect., stating that salaries and "*other incidental charges herein beforementioned*" should, in *any* event, be paid out of the publick treasury. This Act also has no GENERAL clause on the subject of disbursements similar to the one now in question.

This Act, by expressly limiting the salaries to be in consideration of "necessary expense" as well as trouble, is supposed to have varied from the general principles, that salaries are given merely in consideration of personal service, and that the expenses of publick institutions, are, (in addition,) to be borne by the publick. The correctness of this idea is farther manifested by the omission to insert in this Act any *general* clause on the subject of disbursements, but, on the contrary, restricting them to certain specified items.

In the year 1732 (see ib. ch. 9, sect. 10, p. 479) a legislative construction of the former Act is given, which

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entirely corresponds with the above idea. After stating, in the preamble of sect. 9, that the salaries of the inspectors were too high, and the services, *as well as expenses of keeping servants*, of the inspectors, were very *unequal*, at different warehouses, it goes on to *apportion* the several salaries of the inspectors, having especial reference to the degree of expense, as well as personal service, incidental to each warehouse.

Nearly *all* the salaries are also diminished by that Act, and the number of inspectors is reduced to *two*.

This diminution and reduction, notwithstanding it *increased* upon the inspectors the expense of keeping hands, does not produce any change of the construction of the Act of 1730; the material features of which, in relation to the subject just mentioned, still remained unaltered: but, on the contrary, this last Act contained an express legislative decision that the expense of keeping servants appertained to the inspectors, and partly in consideration of which their salaries were settled: but for that expense, the salaries would, perhaps, not have been rated so high.

In the next Act, which passed in 1748, some variations are found to have taken place, compared with the beforementioned Act of 1730. In the first place, the salaries are directed, by sect. 36, p. 388 of edit. of 1752, to be paid "to the several inspectors appointed to attend and attend-"ing the several warehouses;" omitting to specify that they are given in consideration of *expense* as well as trouble: and, 2dly, a *general clause* concerning disbursements is inserted, (sect. 55,) literally, as to the point in question, corresponding with the clause in the Act of 1792 now before us. Indeed, these two lastmentioned *alterations* have been since kept up in all the subsequent tobacco laws. This general clause concerning disbursements does not embrace the charge in question: 1st, because by the 38th sect. of the same Act the general fund is charged, as in the clause in the Act of 1730 before stated, with "salaries, "rents, and *other incidental charges in this Act mentioned;*" thereby tying down the construction to the charges particularly specified in the Act; and, 2dly, because, by the 56th sect., it is declared to be a *breach of duty* in the inspectors *not to keep a sufficient number of hands* at the several warehouses. The variation in the clause giving the salaries does not produce that effect; not only for the reasons just mentioned, but because the apportionment and the quantum of the salaries is *supposed* to be generally kept up as established by the Act of 1730; and, since by that

Act a part of the compensation was in consideration of *expense* as well as trouble, if the inspectors were intended by the last Act to be eased of the expense, it is supposed that their salaries would have been proportionally reduced; or, rather, it is not supposed that they would have been thus, by a side-wind, *increased*.

The Act of 1764 is not different in the particulars now in question from the Act of 1748 just mentioned; and the Act of 1766 (ch. 14, sect. 16, p. 472 of the edit. of 1769) requires the courts of CERTAIN counties to limit and direct what number of hands shall be kept by the inspectors at *certain enumerated warehouses*, (of which this is not one,) with a proviso that *such* inspectors shall be allowed for all hands *exceeding two* at the rate of £15 per hand:—that is, it leaves all the other warehouses on the general ground of *duty and responsibility before stated*, and subjects these specified warehouses to this new regulation.

The Act of 1783, (Chan. Revisal p. 197, sect. 28,) fails to declare *particularly*, as was antecedently done, that it is a breach of duty for the inspectors to omit to keep the *necessary number of hands;* but declares that for *any breaches* of duty they are to be punishable and responsible. It also in section 15 declares that the inspectors shall constantly keep so many hands, *not exceeding two*, as the several courts wherein, &c., shall, from time to time judge necessary; that is, it makes *general* the beforementioned provision, which the Act of 1766 applied to *particular warehouses;* and, instead of the provision in the Act of 1764 making it the duty of the justices to view and report (*inter alia*,) upon this subject of *keeping hands*, subjects the breach of the duty imposed by the 15th section to the general penalty prescribed by the Act.

It is supposed to have been *beneficial* for the inspectors to subject them to a *prescribed* and *limited* charge, imposed by the County Courts, whose *respectability* is undoubted, and who would generally consult the inspectors as to the number of hands necessary; rather than leave them, as before, subject to the *posterior* opinion of the justices, and the penalties thereupon attaching, as applying to each particular case. If the courts could be suspected of the wantonness of unnecessarily invading the rights of the inspectors, that power would equally exist in the latter case as in the former.

Under the *limited* provision of the Act of 1783, therefore, I see no reason to vary the construction of the Act re-

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specting the charge in question. But, in 1792, the *limitation* on the County Courts in relation to the number of hands is done away, and the question is whether this circumstance varies the case. It is important moreover that that Act eventually abridges and reduces the inspectors' salaries; I mean in the event of the particular warehouse not yielding money enough to pay those salaries; whereas, by the former laws, the *whole salaries* were, in all events, to be paid.

It is important too, that heavy penalties are added by the Act of 1806; and it may be argued from the existence of those penalties that a construction should not prevail which, by making this expense chargeable to the inspectors, (liable too as they are to have their salaries eventually reduced as abovementioned,) would leave those penalties without any corresponding consideration.

As to the last source of diminution, I answer, that it is merely possible and *eventual;* and that the inspectors take their offices with a full knowledge of its existence: as to the first, the power of the courts is not *enlarged* on this subject, with reference to what it was originally. *Formerly*, the salaries of the inspectors were liable to be reduced by penalties for neglect of duty; and *now*, by a general *preexisting ascertained* charge. The *limitation* on the courts, first *partially* created (but not so as to reach the *warehouse in question*) by the Act of 1766, and which was made *general* by the Act of 1783, has been abolished by the Act of 1792; and the *original ground*, taken by the inspection Acts, reoccupied; with this only difference, (which perhaps, is not injurious to the inspectors,) that, *now*, instead of being left subject to penalties, actions, and abatements of salary, applying to each particular breach of duty, that duty, or, rather, the expense which is equal to its discharge, is previously ascertained by a general regulation imposed by the respectable tribunal of the County Courts.

The legislature had the same right to go back to the *original ground* taken by the inspection Acts, and to vary its modifications, without essentially changing its principles, as they had to retain the *restricted* and *limited* system upon this point established by the Acts of 1766 and 1783. That restriction and limitation is entirely done away by the Act of 1792. We cannot relate back to and revive the PARTIAL provision on this subject, contained in the Act of 1766, which is made general by the Act of 1783; because the general words in the Act of 1792 would

equally sweep away the restrictions contained in the former Act as in the latter.

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I am, therefore, of opinion that the *whole* charge now before us ought to be paid by the inspectors, and that the judgment of the General Court is correct.

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Judge FLEMING. From the view already taken of the several Acts of Assembly on the subject, prior to the year 1792, when the principal Act now in force was passed, it may be perceived that the legislature, at different periods, thought differently with respect to the duties of inspectors, and the number of hands to be by them employed at the several warehouses.

By the Act of 1764 the justices were to visit and superintend the respective warehouses, and, in general, to see that the inspectors did their duty; and, particularly, that they kept a sufficient number of hands for despatching the business.

By the Act of 1766 the courts of the several counties in which the warehouses respectively lie, (as particularly enumerated in the Act, and of which the County of Chesterfield is one) should, annually, in the month of September, or at the next succeeding court, *limit and direct what number of hands* should be kept by the inspectors, and such inspectors were respectively to be allowed by the treasurer, in their accounts, *the sum of £15 annually for each hand so limited* and by them employed above the number of *two*.

By the Act of 1783, the County Courts, in directing the number of hands to be kept and employed by the inspectors, were expressly restricted to the number of *two* at each warehouse; which virtually repealed the allowance for *extra* hands made by the Act of 1766.

The legislature, however, in 1792, finding by experience that *two* hands, at some of the greater warehouses, where large quantities of tobacco were received, were inadequate to perform the labour required, again gave the County Courts unrestricted power to direct the number of hands to be kept at each respective warehouse; but omitted to make an allowance for the *extra* hands so to be kept and employed, as had been done in the Act of 1766.

Under the equity of that Act, however, a majority of the Court, supposing that the legislature did not mean to impose an extraordinary additional expense on the inspectors, without some compensation for the same, think themselves authorized to make an allowance of £15 to

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the appellants *Graves & Goode*, for each of the two *extra* hands, directed to be kept and employed at their warehouse; and, though that sum may be inadequate to the hire of able hands at the present day, yet, that being the allowance fixed by the Act 1766, the court thinks it cannot go beyond that sum; but, upon a fair and respectful representation of the hardship to the legislature, redress may perhaps be obtained.

The judgment is to be reversed, and an allowance of one hundred dollars to be made to the appellants in their account for two extra hands by them employed at the said warehouse for the year 1806.*

* *Note.*—In this case, a motion was made, at a subsequent day of the term, to permit the clerk to grant a certificate of the judgment of the court before its adjournment, in order that it might be entered as the judgment of the General Court which was then sitting: otherwise, an execution could not issue in behalf of the commonwealth, until after the June term of the General Court; the law, which directs the clerk of the Court of Appeals to transmit copies of judgments and decrees, to the clerks of *District Courts*, and authorizes executions thereon in vacation, not extending to the *General Court*. (See Rev. Code, vol. 1, ch. 249, sect. 6.) But the motion was denied.

Saturday Oct. 17th.

Ammonett *against* Harris & Turpin.

In a joint action of assault and battery against twelve defendants, the process having been served on two only, and they having appeared and pleaded not guilty, the jury found them guilty in general terms and assessed damages against them jointly.

Charles Ammonett brought an action of trespass, assault, and battery, in the District Court of Richmond against twelve defendants jointly. Some of them eluded the process, and others prevented it from being served upon them, by force; so that, in the end, the writ was executed on four only. *Casey* and *Landrum*, two of them, on whom it was first served, appeared and pleaded not guilty; and a verdict was rendered against them jointly for £ 600. At the term in which the verdict was found, for reasons appearing to the court, it was ordered that, unless the plaintiff should within three months, release to *those* defendants £ 500 part of those damages, the judgments should be set aside, and a new trial granted *them*, and the cause again put upon the docket; but, in case of such release, that execution be issued for the balance and costs. The release was executed accordingly, and the plaintiff took judgment and sued out execution for the balance, part of which was levied. Afterwards, two other

defendants, *Harris* and *Turpin*, having been served with process, after the former had filed their plea, but before the judgment had been obtained against them, and the cause standing as to *them* on a new writ of inquiry, appeared and pleaded the release as to *part*, and judgment for the *residue* of the damages assessed, in bar of any farther assessment of damages; bringing into court and tendering to the plaintiff the full balance due on the judgment.

To this plea the plaintiff demurred specially; and for cause of demurrer, assigned that the *present* defendants were not arrested when the former filed the plea; that the jury might find the *present* defendants guilty of several parts of the same trespass, or one of them guilty of the same at different times; that several damages might be assessed against several defendants, in the same action, according to their several degrees of guilt; and that the order of court, directing the release, applied to the particular judgment against the first defendants, and related to that particular judgment alone.

The defendants joined in demurrer; and judgment was thereupon given in their favour, to which the plaintiff obtained a writ of *supersedeas* from one of the Judges of this court.

The plaintiff, in consequence of an order of the court, released a part of the damages to those defendants (saying nothing of the others,) and took *judgment* for the residue. After this, he could not proceed to obtain *additional* damages against any of the other defendants. But if he had not *taken judgment*, he might have had damages assessed, on other issues or writs of inquiry, against the other defendants, and finally taken judgment against any *one* of them *pro melioribus damnis*.

Randolph, for the plaintiff in error. The release was to *Casey* and *Landrum*, saying nothing about the other defendants. I contend, therefore, that it enured to those only to whom it was given.

My primary position is, that, in this action, and under these circumstances, it was in the power of the jury to sever the damages. If this position is in my favour, the release enured *distinctly to Casey* and *Landrum*: so too, the execution was against men who had committed separate injuries; and so, in the fourth place, the doctrine of taking judgment *pro melioribus damnis* did not apply.

I. Whether, where the declaration is joint, the jury can sever the damages.

On this point, if *reason only* is consulted, the question will be decided in the affirmative. *Torts* are either joint or several: the guilt of one man is not that of another: and different considerations ought to apply to persons of different wealth.

Reason only ought to be consulted, because the authorities are very numerous, confused, and contradictory. The chief is Lord *Mansfield* in *Hill* and another v. *Good-*

Quere: would the case have been otherwise, if the first verdict

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child, 5 *Burrow*, 2790: and he declares there is so great inconsistency in the cases, it is impossible to reconcile them. I argue, therefore, that you are emancipated from British authorities as to this point, and should settle the law by your own decision. But, if we are to be governed by *precedent*, that case is different from ours: for *there* the jury found all the defendants *jointly guilty;* whereas, *here*, although *Casey* and *Landrum* had a *joint* judgment against them, *Harris* and *Turpin* were not then before the court. We cannot avail ourselves of the observation of Lord *Mansfield*, relative to cases where defendants are *charged* severally: but he says that his decision has no application to cases where they *plead* severally.

had only apportioned, *upon the then defendants*, their *quota* of the damages?

The principle in the case of *Jones v. The Commonwealth*, 1 *Call*, 555, is in our favour. 1 *Bulstrode* 157, cited in 5 *Burrow* 2791, is in point. *Cro. Eliz.* 860, *Austin v. Wilward*, states that where one is found guilty in part, and the others in all, the damages shall be severed. But 11 Co. Rep. p. 5, *Haydon's case*, is in our favour; and it will appear that all the decisions which prohibit severance of damages are where the cases of all the defendants were submitted to the *same jury;* and no instance occurs of an authority against severing the damages, where the defendants are, at different times, brought before *different juries*.

If the jury, in a joint action of assault and battery, assess the damages severally against the several defendants, (the cases of *them all* being before the *same jury*,) it is *error*, unless the plaintiff enters a *nolle prosequi* against all but one, and takes judgment for the damages assessed against that one, in which case the error is cured.

Chapman v. *House* and others, 2 Stra. 1140, shows that where the defendants *severed in their pleas*, the jury might assess separate damages. *Lowfield v. Bancroft* and others, 1 *Stra.* 910, is a case against us. Yet, in the same book, the case of *Lane v. Santloe*, p. 79, is in our favour.

II. The release enured to *Casey* and *Landrum* only. *Esp.* 415, *Cook v. Jenner*, (cited from *Hobart*, p. 66.) appears against me on this point: but the release executed by *Ammonett* was not *voluntary*, but directed by the court. Besides, if my doctrine is true, that the damages might be severed, how can this release operate in favour of other defendants, who were not then before the court?

III. These were different judgments; therefore different executions might be issued.

IV. The doctrine *de melioribus damnis* does not apply to circumstances like these, where the defendants drop in at different times; but only where the judgment is obtained against all at once. When *Casey* and *Landrum* had pleaded, we were not bound to wait till we could get them all before the court. This would have been a great hardship upon the plaintiff. If a contrary doctrine should pre-

vail, a wealthy defendant, to screen his own fortune, might put forward others, who were his tools, and worth nothing.

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Judge TUCKER. Might not the severance of damages lead to the inconvenience you mention? A man might set on another to commit a trespass. The instigator might be compelled to pay only one shilling, while a large sum might be assessed against the insolvent perpetrator.

Randolph. The severance of the damages is the only way to prevent that inconvenience. The jury would find against each according to the enormity of his offence, and consider the sum which had been granted against one, in estimating the damages against the rest.

Wickham, for the defendants in error. No authority can be produced to show that there may be several verdicts and several *judgments* against defendants who are *jointly* sued. Where the object is *punishment*, the atrocity of the crime and the property of the offender ought to be considered, as in *Jones v. the Commonwealth;* but, where *compensation* for the injury is in question, the injured person has a right to look equally to all who have injured him.

In *Co. Litt.* 232 *a.* it is said that a trespass is joint or several at the will of him to whom the wrong is done; and in *Esp.* 395, quoting *Yelv.* 68, that, if the person injured sues one and obtains judgment, the others may plead it in bar.

It is a strange doctrine that, although you cannot by *separate actions* recover separate damages for one and the same trespass, yet *in a joint action* you can.

I admit that, where the trial is of several issues, or writs of inquiry, by different juries, the damages may be severed. This arises from the necessity of the case; and *there* an execution must be taken *de melioribus damnis*. But I never heard before that twenty different *satisfactions* could be obtained for the same injury. The jury must take into consideration the *whole injury*. If, then, there were twenty juries, the plaintiff might recover twenty times as much as he was entitled to.

Lord *Mansfield*, in *5 Burr.* 2790, decided only certain points; leaving others to be settled by comparison of the authorities. *Sayer's* Law of Damages, p. 148, 149, cites *Bulstrode*, 157, and says, "it may be inferred, from di-"vers cases both prior and subsequent, that this case is "not law." *Austin v. Wilward* and others, *Cro. Eliz.*

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860, was a case where some were found guilty in part, and others in all:—but this is not a case of that sort; for, here, it was not a divisible offence, being a single assault and battery; and the verdict was that *Casey* and *Landrum* were guilty of the *whole*.

From 2 *Bac. Abr.* 272, and the authorities cited there in the margin, it appears that the jury cannot regularly assess several damages for one trespass, where the charge in the declaration is joint. *Mitchell v. Milbank* and others, 6 *Term Reports*, 199, is a very strong case against Mr. *Randolph*. According to that case, where the judgment is *pro melioribus damnis*, it must be against one only, and a *nolle prosequi* must be entered as to the rest.

Where there are verdicts at different times against several obligors in a bond, the plaintiff can have only one satisfaction. So here he can have but one satisfaction.

Mr. *Randolph* says his client was not bound to wait till he could get the other defendants before the court. Agreed: but he might have got his verdict against those who were arrested,—have proceeded afterwards to get verdicts against others, and finally taken his judgment and execution *de melioribus damnis*. He did not choose to do this; but made his election in the first instance.

It is contended that he might have got greater damages of the other defendants: but he chose the first which were assessed, considering them better, as being prior in point of time.

Randolph, in reply. We contend that we had a right to prosecute the suit against *Harris & Turpin*, notwithstanding that against *Casey & Landrum* had been decided.

The principal point in this case is excepted out of the points declared to have been decided in *Hill v. Goodchild;* and the authorities preceding that case are in our favour.

Bulstrode, 157, *Sampson v. Gideon*, dated the 9th of *James* I, is expressly in point. The general character of *Bulstrode's* Reports is unquestionable. How then is the credit of this case to be destroyed? Only by *Sayer* on Costs and Damages. He says its authority is shaken by other decisions. I will endeavour to run through all the cases, and show a principle which should prevail.

Cro. Eliz. 860, is an authority for us. But this is objected to, in consequence of a note in 2 *Bac. Abr.* 272, where 1 *Bulstr.* 50, and *Carth.* 20, *Rodney v. Strode*, are cited. The inference from *Carth*, 20, is that, if a *nolle prosequi* had not been entered, it would have been error.

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But, in that case, I grant, the damages ought not to have been severed; because the jury found all the defendants equally guilty.

The rule, I contend, is, that, wherever *equality of guilt* is found by the jury, they have no right to sever the damages. *Onslow v. Orchard*, 1 *Stra.* 422, is said to be against us. This was a loose note of *Strange* the reporter; but comes within my rule; for the trespass there was *confessed.*

It is contended that an assault and battery is a single, and not a divisible offence: but surely there may be a difference of degrees in assaults and batteries, and different parts may be acted in the perpetration. 2 *Stra.* 1140, and *Haydon's case*, 11 *Co. Rep.* 5, are both in our favour. All the cases which seem against us may either be overthrown, or brought within the rule I have mentioned. In 6 *Term Rep.* 199, there were three writs of inquiry; and I admit it was error to sever the damages; because there was a judgment by *nil dicit*, and thus an implied confession of the guilt of all. 3 *Levinz* 324, *Smithson v. Garth* and others, 1 *Wils.* 30, *Cro. Jac.* 251, 118, and *Jenkins's centuries*, 317, cited in *Hill v. Goodchild*, are all cases of *entirety of guilt*, and do not contradict the rule.

Analogy also is in our favour, the doctrine being similar in actions on the case for malicious prosecutions.(*a*)

The practice of this country sanctions the doctrine for which I contend. The suit against *Casey* and *Landrum* was put separately on the docket.

(*a*) 1 Stra. 910, ib. 79, Lane v. Santloe, *Cro. Car.* 54, Player v. Warner & Dewes. 1 Plowd. 91, *a.*

Judge ROANE. Why, in a declaration against one of several joint trespassers, is he charged to have committed the trespass *simul cum aliis?*

Randolph. To give notice of the nature of the trespass.

Judge ROANE. Is it not rather the mode of declaring separately? If he charged them all together, would he not be *estopped* from saying that their degrees of guilt were *unequal?*

Randolph. Upon principle our doctrine ought to be sustained. The case of a joint bond is different from this. There are no degrees of *obligation in that case;* but there are degrees of *guilt in trespasses.*

As to the choice *de melioribus damnis*, *Rastall* may be said to be against us; the entry in that book being against one defendant only: but, where judgment has been ren-

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dered, it is too late to take it *pro melioribus damnis*. In 1 *Wils.* 30, it is said, that the plaintiff may take judgment *pro melioribus damnis*, where there are several damages assessed; but that, after the term is over, it cannot be done.

Judge LYONS. May not the judgment be delayed until issues or writs of inquiry have been tried as to all the defendants?

Randolph. Delay the judgment! What inconvenience would this produce!

Judge LYONS. So far as I have been concerned as counsel, I have always dismissed the suit against the other defendants in such a case.

Randolph. If *Rastall* is against us, it was the *court's* duty to have directed a stay of execution. If they neglected to do this, we ought not to suffer *for their error*. It ought now to be rectified, by setting aside the execution, compelling us to return the money received, and to stay until the writ of inquiry shall be tried.

The *release* ought not to operate to our disadvantage; *its words* not having that effect. I admit that in *Hob.* 66, *Cooke v. Jenner*, (which, too, was a case of *equal guilt* in all the defendants,) the release ought to have been a bar; but not in this case. In the same book, p. 70, and *Cro. Car.* 239, the doctrine is laid down, that a release to *one, against whom a judgment has been obtained*, is no release to another *against whom there is no judgment:* and, that a release to a *judgment* is no release to an *action*, the authorities are express.

Saturday, October 31st, 1807. The Judges delivered their opinions.

Judge TUCKER stated the case, and then said: The case of *Hill* and another *v. Goodchild*, 5 *Burrow* 2790, with the multitude of cases there cited on both sides, was relied on by the counsel for the appellants, to show that the law of this case has never been settled, to this day, in England; and he called upon this court to establish a precedent that might settle it in future.

That case, like the present, was a *joint* action of trespass, assault, and battery, against two defendants, who pleaded not guilty, and the verdict found them *jointly*

guilty, but assessed the damages *severally*; as to one *forty* shillings, and as to the other *one* shilling only; and the plaintiff took his judgment accordingly, which was reversed in the Court of King's Bench; the court holding that, as the trespass was *jointly* charged upon both defendants, and the verdict found both *jointly guilty*, the jury could not afterwards assess *several* damages. And several cases were referred to by the court as warranting their opinion: among others, *Crane & Hill v. Humberston*, Cro. Jac. 118, in which case the defendants *severed* in pleading, which brings it precisely to the case before us. That case was also a writ of error in K. B.; and the error assigned was, that in trespass of battery and wounding, the one pleaded, to all except the wounding, that it was in his own defence; and, to the wounding, not guilty. The other justified *all* in his own defence. And, upon issue joined, the jury found the first guilty of the *wounding*, and the other issue against him also, and assessed damages to £20; and found the issue also against the other defendant, and damages £100; and judgment was given accordingly, of the several damages against them; and the error assigned was "because there ought to have been but one judgment for the damages; and the *plaintiff* ought to have made his election against WHOM he would have taken his judgment. And the whole court was of *that* opinion; and for this cause the judgment was reversed.

A precedent more in point (except that the issues were probably tried, and the damages assessed by the same jury) cannot easily be supposed. It may be worthy of observation that the issues were perfectly distinct. First, one of the parties pleads that, as to all but the *wounding*, it was in his own *defence;* and, as to the *wounding*, not guilty. The second defendant justifies *all* in his own defence. The jury might have acquitted the first upon one of his pleas, and found him guilty upon the other; and at the same time have found the second not guilty as to the whole, or guilty as to the whole. Yet, inasmuch as they found *both* guilty, though upon these several pleas, the court held that, although they had severed themselves in plea, yet, when they were both found *jointly* guilty of one and the same battery, *one judgment only* ought to have been given. The case of *Strode v. Rodney*, *Carthew* 19, was also relied on by the court in their opinion. That was an action of trespass, and false imprisonment, and imposing the crime of treason on the plaintiff, against three defendants. One of them confessed the action: the

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other two pleaded *jointly*, not guilty. There was a verdict for the plaintiff on that issue, and £1000 damages against one, and £50 against the other defendant. The plaintiff entered a *nolle prosequi* against him who let the judgment go by default, and against the other defendant for the £50, and took judgment only against *Strode* for the £1000. And it was held that the *defect of the verdict* was cured by the *nolle prosequi*. For, as the plaintiff might have brought this action against them, jointly, or severally, so it is but reasonable that he should have the same election as to the damages; although it was objected that the plaintiff hath election *de melioribus damnis*, only where the *trials* are at *several* times; and this was a fact of which they are all equally guilty, and that it was a contradiction to say that the plaintiff was injured by one to the value of £50, and by the other to the value of £1000. And this judgment was affirmed in the Exchequer Chamber, and also in the House of Lords, as we are informed by a marginal note, in 2 Bac. Abr. (old edit.) 9 Tit. damages.

In the case of *Mitchell v. Milbank*, 6 Term Rep. 199, where the plaintiff executed three writs of inquiry against three several defendants who suffered judgment to go by default, and several damages were assessed thereon; the court held that, if he had entered up final judgment on the several damages on these interlocutory judgments, it would have been *erroneous;* which shows the same principle to be still adhered to in the English courts, as in the cases which I have mentioned. The result of all which seems to be, that the plaintiff shall have but *one* recompense in damages, though the assault and battery be committed by several, and though his action be brought either joint or several. 1 *Esp.* 321, 2d edit. The case of *Jones v. The Commonwealth*, (1 *Call*, 555,) may be supposed to be in opposition to this opinion. But that was a *criminal* case; and, independent of the principle arising out of our own peculiar constitutions and laws, we have the authority of the court in *Strode v. Rodney* (where it is said to be true, that when several persons are found guilty *criminally*, then the damages may be severed in proportion to their guilt, yet it is otherwise in civil cases, 3 *Mod.* 102,) for the distinction. So that I do not consider the decision in that case as affording any rule for our opinions in this.

It would seem from the precedents in *Rastall's* entries 654, that, where a joint action of trespass is brought against several defendants, if there be a verdict against one or more of them at one time, and the plaintiff chooses

to proceed against the rest, the regular course is to enter judgment against the first, with a *cesset executio* until a trial is had as to the other defendants. And then the plaintiff may elect against *which of them* he will take his final judgment, and enter a *nolle prosequi* as to the rest. But, in the case at bar, there was no *cesset executio* entered as to the judgment against *Casey & Landrum* until the other defendants should have answered, &c. on the contrary, the plaintiff sued out his execution, and thereby *determined his election* to recover his damages against them *only*. And this we are told may be pleaded in bar by the other defendants. 1 *Esp.* 318, who cites *Yelverton* 68. And the reason given is that beforementioned; that the plaintiff can have but *one* recompense for the same injury.

As to the release, it is laid down in *Cooke v. Jenner Hob.* 66 cited 1 *Esp.* 415, that, if a trespass be *joint*, a release to *one* is good to *all*. Here the release was not *total*, but merely for a part of the damages assessed by the jury. The plaintiff had his election to take £ 100 damages, only, instead of £ 600, or to submit to a new trial: he elected to take the £ 100; and he sued out his execution thereupon. He thus determined not only the *quantum* of the recompense, but the *persons* against whom he would take it. And this might well be pleaded in bar by those who had not before appeared and answered to his action. I am, therefore, of opinion that the judgment be affirmed.

Judge ROANE. It is a general principle applying to civil actions against joint trespassers that the act of one is the act of all the parties present, as they all unite to do an unlawful act, though in fact one may be more malicious and do greater injury than another. 11 Co. Rep. 5, *Haydon's case*. In conformity with this position, it is held that a recovery in a separate action against one trespasser may be pleaded in bar to an action brought against another.

This position seems decisive of the case before us. However the case might have been if the damages had been *severed*, in relation to *Casey* and *Landrum*, in which case it might have been right to apportion upon the present defendants their quota also; (thus making out among all the defendants a full satisfaction for the whole injury;) yet, in this case it is clear that the first verdict extended to the whole injury; and the damages thence arising have been satisfied or tendered. The appellant, by accepting the damages given by the first verdict, has waived his

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right to go against the present appellees for the whole injury, and elect *pro melioribus damnis;* and he cannot go against them again for *their proportion* of the damage done to him, because this is already included in the verdict rendered. The case might have been otherwise, (but on this I give no opinion,) if the first verdict had only apportioned upon the *then* defendants their quota of the damages.

On this ground I think the judgment of the District Court perfectly correct.

Judge LYONS. The law is laid down in *Buller's Nisi Prius*, p. 20, (citing *Yelv.* 68,) that, if a battery be committed by several, and a recovery be had against one, such recovery may be pleaded in bar to an action for the same battery against another; and, in *Co. Litt.* 232 *a*, that a release to one of several persons who were guilty of a joint trespass operates as a release to all.

"It is also a maxim that, where the inquest is taken "by the issues of the parties, by the same inquest shall "the damages be taxed for all." [*Buller*, 20, *Carth.* 19, *Rodney* and *Strode.*

"It is the constant practice now to let the writ of in- "quiry issue so that the same jury tries the issue and "and assesses the damages; and, in case the defendant, "who pleaded, is acquitted, yet the plaintiff shall go on "to assess damages against the others; and, if one of the "defendants appears, pleads, and is found guilty, and, "afterwards, another does the same, and is likewise found "guilty, he shall be charged with the damages taxed by "the former inquest; for the trespass which the plaintiff "has made joint cannot be severed by the jury, if they "find it to have been done by all at one and the same time: "but, if the jury find one guilty at one time, and the other "at another time, there several damages may be asses- "sed."(*a*) (It is a question, however, whether, in the last mentioned case, a *joint* action *ought* to be brought.) So, if there be several defendants, the jury may find them, severally guilty as to part, and severally not guilty as to the residue, and assess damages severally.(*b*) But this is the case with respect to trespasses committed on lands, and the like; but cannot apply to assaults and batteries.

(*a*) Str. 1222, 11 Co. 5.

(*b*) *Carth.* 20.

In the case of *Chapman v. House*, &c. [2 Str. 1140] Chief Justice *Lee* was of opinion that the jury might assess separate damages where the defendants *severed in their pleas.*

But the doctrine is plainly declared in *Hill* &c. v. *Goodchild*,(c) that, in a joint action of trespass, *where the jury find the defendants jointly guilty*, they cannot sever the damages according to the degrees of guilt.

I do not think that the present case calls for an opinion, as to what might have been the decision, if the defendants had been charged *jointly and severally;* or had *pleaded severally;* or had been found guilty of *several parts of the same trespass, at different times;* or, if *two several trespasses had been joined* in the same action, and damages had been severally assessed according as the defendants were severally guilty.

But, conformably with the principles settled in the authorities which have been quoted, the judgment must be AFFIRMED.

(c) 5 *Burr.* 2790.

COCKE, CRAWFORD & Co. *against* ROBERT POLLOK & Co.

Friday, Oct. 30th.

A bill was presented to the Judge of the Superior Court of Chancery for the *Staunton* District, by *Cocke, Crawford* & Co. praying that a judgment obtained against them by *Robert Pollok* & Co. in the District Court of *Charlottesville* might be enjoined. Neither the plaintiffs nor defendants in this bill were resident within the *Staunton* Chancery District; but the county of *Albemarle*, (within which is the town of *Charlottesville*,) had been annexed thereto by an Act of the General Assembly.

Previous to this application, the question, whether the Superior Court of Chancery for the *Richmond* District, or that for the District of *Staunton*, possessed the jurisdiction to grant injunctions to the judgments of the District Court of *Charlottesville* had been twice agitated.

In the case of *Johnson* v. *Harris*, on the 12th of February 1807, an opinion on this subject was delivered by the Honourable CREED TAYLOR, Chancellor of the Richmond District, in consequence of an application to him in vacation, for an injunction to a judgment of the Superior Court of Law holden at *Charlottesville;* which opinion was in the following words.

The several Superior Courts of Chancery have power to grant *injunctions* to the judgments of all courts of common law within their respective districts, and not otherwise; the place where the court at law is holden, and not the residence of the parties, furnishing the rule of jurisdiction in such cases.

"The difficulty, if any, in the present case, arises upon "the constructive operation of the Act of the last Assem-

This court has no dis-

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" bly,(a) passed on the 12th of January, by which *Albe-*
" *marle county* is made a part of the district for which a
" Superior Court of Chancery is directed by law to be hol-
" den in the town of *Staunton*. To determine this ques-
" tion, it may not be improper to examine the Acts, by
" which that, and the other Superior Courts of Chancery,
" were established.

" By the Act of the Legislature passed on the 23d of
" January 1802(b) concerning the High Court of Chance-
" ry, three Superior Courts, in lieu thereof, were esta-
" blished: one to be held in the town of *Staunton*, for the
" District assigned to it; another to be held in this place
" for the District assigned to it; and the other to be held
" in the city of *Williamsburg* for the District assigned to it:
" a part of the District assigned to the court of this place
" was the *county of Albemarle*, comprehending *Charlottes-*
" *ville*, the seat of *two* common law courts: the Judges of
" the Superior Courts of Chancery, in term time, as well
" as in vacation, were to have, and to exercise, *within their*
" *respective districts*, the same jurisdiction and powers, as
" the High Court of Chancery, or the judge thereof pos-
" sessed, on the first of January in the year last mention-
" ed.

" By a supplemental Act passed on the 2nd of February
" in the same year,(c) the distribution of the suits depen-
" ding in the High Court of Chancery on the first day of
" that month were to be made in the following order, that
" is to say; 1. To the Chancery Court of that district in
" which the defendant should reside, should there be but
" *one*; but, if there were *two* defendants, then to the Chan-
" cery Court of that district in which the one first named in
" the plaintiff's bill should reside; and, if there were
" more than *two*, then to the Chancery Court of that dis-
" trict, in which the majority should reside: but, if the
" number should be equal in different districts then to the
" court of that district, in which the first-named defen-
" dant in the plaintiff's bill should reside.

" 2. All *injunctions* depending in the said High Court of
" Chancery on the first of February 1802, should be sent
" *to the court of that district* in which the *judgment en-*
" *joined was rendered*. 3. All *injunctions* awarded by the
" Judge of the High Court of Chancery, previous to the
" first of February 1802, were to be issued by the clerk
" of that court, in like manner, as if the Act of the 23d of
" January had not passed, to be arranged and allotted, as
" in the other cases of injunctions. The clear and obvi-

cretion as to the costs of an appeal; but must allow them to the party prevailing.

(a) See Acts of 1806, ch. 94.

(b) Rev. Code, 1 vol. p. 426.

(c) Rev. Code, 1 vol. 428.

" ous intention of the legislature, in branching the High " Court of Chancery, was to afford a more *speedy*, as well " as a more *convenient* administration of justice to the " people at large: 1. it would be more *speedy*, because " *three* courts would be acting instead of *one*: 2. it would " be more *convenient*, because they were to be held in " *convenient places* assigned to them, *in their respective* " *districts*, and were to exercise the same *jurisdiction and* " *powers therein*, as the High Court of Chancery, or the " Judge thereof *possessed*, on the first of January 1802. " What *jurisdiction and powers* did that court, or the " Judge thereof, *possess*, on that day? They were gene- " ral over the whole commonwealth on that day; but, " as Judge of the High Court of Chancery, he possessed " no *jurisdiction* nor *power*, on the next day; but, as Judge " of the Superior Court of Chancery to be held in this " place, for the district assigned to him, he *possessed* the " like jurisdiction and power *therein*, which he had *pos-* " *sessed*, over the whole commonwealth, the day before. " Such is the force and power of the law: by the same " force and power, a like jurisdiction was given to each of " the other Superior Courts, at *Staunton* and *Williamsburg*, " *within their respective districts:* the three Superior " Courts of Chancery then established by law, *within* " *their respective districts*, were to have jurisdiction, (with " a single exception, as to residence, in original suits, " in case of a plurality of defendants,) as the High Court " of Chancery, or the Judge thereof, *possessed* it, on the " first of January 1802. And do they not still possess it, " *within their respective districts?*—They do. Then, as " the High Court of Chancery, or the Judge thereof, had " the power of granting an injunction to a judgment at law, " *within this commonwealth*, on the first of January 1802, " the same power belongs to, and should be exercised by, " the Superior Courts of Chancery, or the Judges thereof, " respectively, *within their respective districts*, at this day; " for there is nothing in the above recited Act, of the 12th " of January last, which affects the *jurisdiction* of any " court, but only the *extent* of the districts: in other " words, as the *county of Albemarle*, by the Act last men- " tioned, has been annexed to the Staunton chancery dis- " trict, it must *now* be considered in the same situation, " as if it had been a county enumerated among those com- " posing that district, by the Act of the 23d of January " 1802.

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"It is not, as has been supposed, for this court to inquire, *where* the defendant *resides*, because it is not one of those cases, the jurisdiction of which depends upon his *residence*;—but it is necessary, *only*, to inquire *where* is the judgment at law? The answer is in *Charlottesville*. Where is *Charlottesville?* In *Albemarle* county. To what Chancery District does that county belong?—To *Staunton;* within which the Chancellor, at that place, by law, has the same jurisdiction, as the Judge of the High Court of Chancery had, and, of course, the Judge of this court has not. The present application *then* should be made *there*—not *here*. Nor is it material, as has likewise been supposed, to inquire *when* the judgment at law, which is now sought to be enjoined, was rendered; because the jurisdiction of each of the Superior Courts of Chancery, *within their respective districts*, must be over all judgments, from the time each district was formed, enlarged, or diminished, whether such judgments were rendered before, or afterwards. If this was not the case, what Superior Court of Chancery could enjoin a judgment at law of Augusta county, or the Staunton District Court of law, rendered before the establishment of the Superior Courts of Chancery? for the Act, by which those courts were established, is as prospective as the Act, by which the district of the Superior Court of Chancery, at Staunton, has been enlarged, and yet the constant practice of those courts has been to award injunctions to judgments *within their respective districts*, though such judgments were rendered before those courts existed; and, if this was correct, as it is believed to have been, it must now be equally correct for the Chancellor, at Staunton, to award an injunction to a judgment, in the District Court of *Charlottesville*, though rendered before the county of *Albemarle* was annexed to his district. Why? because it would be exercising a jurisdiction *within* his district, *such* as the High Court of Chancery *had* before his district was formed; and, of course, the court *here* has no such power, because it would be exercising a *jurisdiction without*, and not *within* the *district* of this court: for, if the exercise of such a power, on the part of this court, in the present case, would be proper, because the defendant may *reside* in this district, then it would be as proper, if the judgment was in *Monongalia*, *Lee*, or *Accomac* courts, should the defendant *reside* here; and, if under those circumstances it could be done by this court, then, under like

"circumstances, it might be done by each of the other "courts, so that, instead of *three* Superior Courts of Chan- "cery, *exercising within their respective districts*, like "jurisdiction and powers, with those of the late High "Court of Chancery, for the *convenience* of the people, "we should have each of those Superior Courts exerci- "sing a jurisdiction over the whole commonwealth, to the "total destruction of that *speedy* and *convenient* adminis- "tration of justice intended by the legislature; a thing "never thought of by that body, nor authorized by law. "Besides, the courts of common law, within the county "of *Albemarle*, would be no more bound to obey the *in- "junction* of this court than the common law courts in "*Augusta* would; nor could this court enforce it; because "the county of Albemarle is *not* within its *jurisdiction*; "and a court should never act in a case where it cannot "enforce its sentence.

"A difference of opinion, among gentlemen of the first "legal talents in their country, has induced the court to "go more at large into this subject, than would otherwise "have been done.

"Upon the ground of *jurisdiction*, the motion is denied."

In a subsequent case (*Morris v. Trevilian*) depending on the same question of jurisdiction, the Honourable JOHN BROWN, Judge of the Superior Court of Chancery holden at *Staunton*, pronounced the following opinion.

"The plaintiff *Morris* prays for relief against a judg- "ment recovered against him by *James Trevilian* a resi- "dent of *Louisa* County. His bill states sufficient cause "for equitable interposition; and the question made by "the plea and demurrer is, What court shall interpose? "An exhibit accompanying the plaintiff's bill shows that "the Judge of the *Richmond* Chancery District has refu- "sed to take cognizance of the cause, because the judg- "ment at law was rendered in the District Court of *Char- "lottesville* holden in *Albemarle* County, which County, "by an Act of the last Session of Assembly, was annexed "to this Chancery District; and it is now said that this "court cannot entertain jurisdiction because the *defendant* "*Trevilian* resides within the limits of the *Richmond* "Chancery District.

"In order to protect the property of the plaintiff against "what appears, from his bill, to be an oppressive judg- "ment, until the question of jurisdiction is settled, I have

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" granted an injunction; and the plea and demurrer aforesaid have been filed to enable the plaintiff to carry his " case to the Court of Appeals, before the judgment at " law is let loose upon him.

" The interest of the parties, as well as of others who " may be similarly situated, requires a prompt opinion on " the question. Mine is offered with an unusual degree " of diffidence; because I, unfortunately, differ, in my " construction of the Acts of Assembly of the 23d of January, and 2nd of February 1802, and the 12th of January " 1807, respecting the jurisdiction of the Chancery District Courts, from a Judge whose opinions I shall always " highly respect, though I cannot consider them, in legal " phraseology, as obligatory upon me. It is readily admitted, that the time of the rendition of the judgment " sought to be enjoined is not material; and the question " is considered, as if it had been rendered since the 12th " of January 1807. Neither time nor inclination will " permit me to go into an inquiry respecting the general " jurisdiction of Courts of Chancery. I shall confine myself principally, to what I consider the true exposition " of the Acts aforesaid on this subject.

" The Act of the 23d of January 1802, establishing three " Superior Courts of Chancery, instead of the one then " existing, and which Act I consider the charter of our " jurisdictional rights, gives, in sect. 7, to each of the " courts thereby established, and to the Judges thereof, in " term time, as well as in vacation, the same jurisdiction, " and powers, within their respective districts, in all and " every matter and thing as the High Court of Chancery, " or the Judge thereof, possessed on the 1st day of January 1802; including, among other specified powers, that " of granting injunctions. But the Judge of the High " Court of Chancery on the 1st day of January 1802, had " the power to award an injunction against any person " residing within the County of *Louisa;* and, therefore, " under the authority of the said 7th section, the Judge of " the *Richmond* Chancery District has now the power to " award an injunction against the defendant, in the present case, who resides in the County of *Louisa*, which " is within the *Richmond* Chancery District as established " by that Act. Perhaps I would be justifiable in saying " that, if there were two defendants in this case, one residing in the County of *Louisa*, which is within the " *Richmond* Chancery District, and the other in the County " of *Albemarle* now attached to this District, the plaintiff

"would have a right, under the 12th section of the said "Act of the 23d of January 1802, to apply for an injunc- "tion either to the Judge of the *Richmond* Chancery Dis- "trict, or of this court.

"If a bill praying for an injunction can be considered "a suit in chancery, this opinion must be correct; and "why it should not I cannot discover. It is not the less "a suit in chancery, because it prays for an injunction to "the proceedings at law, till a hearing can be had on the "equitable matter set forth in the bill; and the 12th sec- "tion authorizes a plaintiff to commence his suit, where "there is more than one defendant, in that district in which "either of the defendants may reside. The jurisdiction "of the *Richmond* Chancery Court over the present case "is therefore plain and obvious, unless it should be sup- "posed that the Act of the 2nd of February, 1802, has "altered the jurisdiction of the Chancery District Courts "in cases of injunctions. I say, *altered*, for I cannot ad- "mit legislative construction as binding upon courts, more "especially where the text is less doubtful than the com- "ment. But, if the Act of February 1802, has altered the "jurisdiction of the Chancery District Courts, in cases "of injunctions, it has, in like manner, altered it and cir- "cumscribed the rights of plaintiffs in their election in "bringing original suits. The 12th section of the Act of "January, gives the plaintiff, where there is more than "one defendant, a right to sue in the district in which "either of the defendants resides. Is this right abridged "by the first section of the Act of February, directing "the clerk of the High Court of Chancery, in the distri- "bution of the causes on his docket, to send the papers, "in cases where there is more than one defendant, to the "court of that district, in which the first named defend- "ant resides, if there are but two; but, if more than two, "then to that in which the majority of the defendants "reside; and, if more than two, and the number, equal, "*then*, to the district in which the first named defendant, "in the plaintiff's bill resides?

"If it is said that this was a measure of necessity not "intended to change the jurisdiction of the respective "courts, or abridge the rights of suitors, but merely di- "rectory to the clerk, and the best possible arrangement "which could be made of the causes upon the docket, the "truth of the observation will be readily admitted; and "the same exposition of the sixth section of the same Act, "respecting the distribution of injunctions depending in

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"the High Court of Chancery on the 1st day of February "1802, is supposed to be correct; *viz.* that it was merely "directory to the clerk, in the distribution of the injunc- "tions *then in court;* and not a legislative exposition of "the law, or, in other words, an alteration of the law "respecting jurisdiction, in cases of injunctions there- "after to be applied for; nor intended to abridge the "rights of plaintiffs applying for them. I confess that I "am unable to discover, in the 6th section of the Act "of February 1802, or in any other part of that Act, any- "thing varying the jurisdictional rights of the courts, or "abridging the privileges of suitors from what they were, "as confirmed and established by the Act of the 23d of "January 1802, either as to *original* suits, as they are "called, or as to *injunctions*, which are also suits, though "commenced in a different way. If it should be in- "quired why the legislature has, in the distribution of "the causes depending in the High Court of Chancery at "the time of the passage of the Act of February 1802, "made a distinction between original suits and injunc- "tions? I answer, first, I consider the inquiry immaterial "in the present case; and, secondly, that I am, perhaps, "unable to give a satisfactory answer. It is sufficient, to "justify to myself the opinion which I have formed, that "the Act directing the distribution of those then depend- "ing is silent respecting those which were thereafter to "be applied for.

"But, perhaps, the necessity of, sometimes, granting "them, without delay, and, very often, the justice of dis- "solving them as speedily, may have influenced the legis- "lature in the enacting of the 4th and 6th sections of that "Act. If *despatch*, in cases of injunctions, was their ob- "ject, the clerk could more readily find in what chancery "district the judgment was rendered than where the "plaintiff at law and defendant in the injunction resided; "more especially as the *subpœna* might not be returned, "and the clerk might not know to what county it was "directed; it frequently happening that *subpœnas* in those "cases go out of the office, without any particular direc- "tion; and the 6th section contains a good general direc- "tion, in cases of injunctions, where, in many instances, "no other direction could be had.

"If it is supposed that this construction of jurisdictional "rights would be productive of great publick inconveni- "ence, I can only observe that, where the law is plain and "explicit, arguments of inconvenience ought not to pre-

"vail against it: the legislature, and not the courts, must "correct the evil. But it is doubted whether greater in- "convenience would result from this than from a different "construction. A., residing in *Richmond*, recovers a "judgment at law, in *Staunton*, against B. residing in the "borough of *Staunton*. Let it be admitted that the situa- "tion of the court rendering the judgment, and not the "residence of the party obtaining it, gives the equitable "control over the case. B., at small expense, and without "any inconvenience, can apply for his injunction. A.'s "remote situation inspires him with hopes of delay, (too "often the great inducement in applications of this kind.) "He applies for, and obtains his injunction, and A. is "subjected to great inconvenience and expense in defend- "ing himself against an unjust suit. Reverse the case; "and let A.'s residence, and not the scite of the court, "give the jurisdiction. If B. has a good equitable "defence, he will not be deterred from setting it up; and "he will be compensated, in part, for his trouble and ex- "pense in prosecuting it. Delay, in that case, will not be "his object; and A.'s situation will encourage him to hope "for a speedy decision. But he will not, for a slight cause, "and without hope of procrastination, at great inconve- "nience and expense provoke his adversary to an unjust "and unequal contest on his own ground. Under either "construction, the territorial line of jurisdiction must be "passed; and the question is, Who shall pass it? The plain- "tiff, or the defendant?

"Let the general fate of injunctions say which construc- "tion is likely to be productive of the greatest mischief.

"There are other cases in which, it is believed, greater "inconvenience would result from a different, than from "the present construction of the right of jurisdiction. The "case before the court affords an example.

"*Trevilian*, the present defendant, residing in *Louisa*, "recovers a judgment against the plaintiff *Morris*, in "*Louisa* Court. Suppose this judgment had not been af- "firmed by the District Court of *Charlottesville*. An in- "junction to that judgment, it is admitted by all, must "have been applied for to the Chancellor at *Richmond*. "But *Trevilian* obtains another judgment, for a subse- "quent accruing injury, upon the same ground, in the "District Court of *Charlottesville*. To enjoin this judg- "ment, application, it is said, must be made *to this court*. "Injunctions are obtained in both cases. The ground of "equity, and the evidence, in both cases, are the same:

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" but the Judge at *Richmond* and *the court here* decide the " question differently. This would surely be a serious " evil; for, though the Court of Appeals would detect " and correct the error, yet it might be sometime first; " and the parties might have been satisfied without re- " sorting there, if there had been but one decision in the " case. Let the process of the court act upon the *person* " *of the defendant*, and one suit will answer, instead of two.

" To the foregoing remarks, lengthened beyond my first " intention, I will only add, that injunctions to judgments " could very seldom, if ever, affect the *courts rendering* " *them;* the judgments being, in almost every case, be- " yond the control of the courts, and generally, of their " clerks, before the injunctions are obtained.

" I have not noticed the Act, of the last session, annex- " ing the County of *Albemarle* to this District; but the " opinion would have been the same, if that county had " been, originally, a part of this district.

" My opinion, therefore, is, that though the judgment " of the County Court of *Louisa* has become the judgment " of the District Court of *Charlottesville*, by its affirmance " there; and though *Charlottesville*, where the judgment " was affirmed, is within this district; yet, the only de- " fendant in this cause residing in the County of *Louisa*, " which is within the limits and jurisdiction of the *Rich-* " *mond* Chancery District Court, as established by the " Act of the 23d of January 1802, and which Act, as it " respects jurisdiction over original suits, and injunctions " brought since the 2d of February 1802, has not been " altered by the Act of the said 2d of February, or any " subsequent Act, except only as to the County of *Albe-* " *marle;* the Chancery Court for the *Richmond* District " has jurisdiction over this cause; and this court has no " jurisdiction over the same. It is, therefore, this 10th " day of April 1807, adjudged and ordered, that the plain- " tiff's demurrer to the defendant's plea be overruled; the " plea sustained, and the bill dismissed—this court would " have said *without costs*, as the plea and demurrer were " filed, by the direction of the court, to settle the question " of jurisdiction; (the plaintiff, on his first application for " his injunction, having been informed that this measure " would be recommended;) but the defendant's counsel " suggesting that the refusing of costs, if an error, could " not be corrected in an appeal taken by the plaintiff; and " the court wishing to indulge him in a measure, which,

" if erroneous, can in this way be corrected, doth further " decree and order that the plaintiff pay to the defendant " his costs, &c."

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In conformity with the above opinion Judge BROWN would have rejected the application of *Cocke, Crawford* & Co. for an injunction, upon the ground that he had no jurisdiction in such a case; but, out of respect to the opposite opinion of Judge TAYLOR, and from a wish to have the question settled by a decision of the Court of Appeals, he granted the injunction, at the risk of the applicants upon the question of jurisdiction.

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After the injunction was granted, the defendants choosing to put the issue of the cause upon *its own merits*, for the purpose of a speedy recovery of the money due them, submitted themselves to the jurisdiction of the court, and insisted upon filing their *answer*.

The court refused to permit their answer to be filed;—ruled their counsel to plead to the jurisdiction, sustained the plea, dismissed the bill, and granted an appeal to the plaintiffs, whereby all further proceedings on the judgment at law remained suspended until the Court of Appeals should decide upon the case.

Under these circumstances, a petition,* signed by *Chapman Johnson*, counsel for the appellees, was presented to this court, in the beginning of the term, praying the earliest day, which would suit its convenience, to be appointed for taking up this appeal; and stating that the court of the Staunton district acted under a belief that the delay to the appellees would be short, that the cause would be decided at the first term of this court, and that thereby a question presenting very frequent difficulties would be finally settled.

The petition was granted, and the record accordingly opened on this day.

Wickham, for the appellants, contended that the same jurisdiction and powers which were vested in the former High Court of Chancery over the whole commonwealth(*a*) were now vested in the several Superior Courts of Chancery *within their respective districts only*;(*b*) that the 12th section of the last recited Act (on which section the appellees relied) and the 3rd and 6th of the supplemental

(*a*) Rev. Code, 1 vol. p. 64, ch. 64. sect. 6.

(*b*) Ib. p. 427, ch. 297, s. 7.

* See the Rule of Court dated May 5th 1806, *ante* III.

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Act(c) were to be construed with reference to the general enacting clause bestowing the jurisdiction,(d) and were parts of the same system; from the whole of which, taken collectively, he inferred that the *place where the court, which rendered the judgment at law, was held*, and not the *residence* of the *plaintiff* or *defendant*, furnished the rule of jurisdiction in granting *injunctions*.

This construction is confirmed by the general law directing the mode of proceeding when injunctions are obtained,(e) which declares that the effect of the injunction is to be suspended, until bond is given in the clerk's office of *the court where the judgment was rendered;* and the clerk of that court is to endorse on the subpœna that the bond is filed. It is manifest that the clerk of the court of common law is to obey the chancery court; and therefore ought to be within its jurisdiction.

(c) Ib. p. 428, and 429.

(d) p. 427, ch. 297, s. 7.

(e) Rev. Code, 1 vol. p. 68, ch. 64. sect. 55.

If this was not the rule, there might be *three* injunctions for the same cause: the complainant might try his chance of success in all the districts. Again; there is a provision relative to the county courts, that, where there are several defendants in chancery, some of whom are not resident within the county, process may be directed, against the non-residents, to any other county;(f) yet no county court has ever granted an injunction to the judgment of another county court.

(f) Ib. p. 377, ch. 226.

Judge TUCKER. Was not that done in the case of *Ambler* and *Wyld?* 2 *Wash.* 36.

Wickham. The objection there was not that one county court had no right to grant an injunction to the judgment of another county court. The decision was that, *by making a new case in one county*, you may examine the propriety of a judgment in another. A county court (if the rule that equity acts upon *the person* only is to prevail,) would even have a right to enjoin a judgment of a district court.

For farther observations, I will refer the court to a better argument than mine, that of Chancellor TAYLOR in the case of *Johnson v. Harris.*

As to the question of *costs*, it is granted that neither party has been to blame; but if *the complainant* was not to blame, he ought to recover his costs. The rule should be, that where the *subject matter* is such that costs may be recovered, the plaintiff ought to recover, if he has not been blamable.

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Chapman Johnson, for the appellees, said it would be an extreme hardship for them to pay the costs, since they were compelled by the court to put in the plea to the jurisdiction, to try a question for the publick good.

On the main question, he argued, that the rule should be, that the jurisdiction is ascertained by the *personal residence of parties*. No process of contempt can be issued from a chancery court to a *common law court*. If the court of common law should suppose that the court of chancery had exceeded its jurisdiction, and should refuse to obey it, would process go against the *court* or *clerk*? No.—It may indeed against the *sheriff*; for, *quoad hoc*, he is an officer of the Court of Chancery.

The 7th section of the Act, by which the District Courts of Chancery were established, does indeed give them the same jurisdiction, *within their respective districts*, that the late High Court of Chancery had over the whole commonwealth. As a part of the *Charlottesville* common-law district is still attached to the *Richmond* Chancery District, if this law is to be understood *literally*, the *Richmond* chancery and *Staunton* chancery have concurrent jurisdiction over the *Charlottesville* district; for why give the *whole* of it to *Staunton*, when only part has been annexed? But, even if the judgment was of *Norfolk* County Court, and the execution in the hands of the sheriff of *Norfolk*, and all the parties *resided* in *Staunton*, the *Staunton* chancery ought to have jurisdiction; for it is abundantly sufficient that equity should have jurisdiction over the *persons of parties*.

By the 12th section, where *one* defendant lives in the district, process is to go against others out of its limits. This evidently shows that the legislature never meant the court to take jurisdiction, where there was no defendant living in the district. The case is similar of defendants absent from the commonwealth.(*g*) Where *all* the defendants reside out of the State, the suit is not to be brought here.

(*g*) Revd. Code, 1 vol. p. 115, ch. 78, sect. 2.

The law for distribution of the papers in other cases shows that the legislature understood the *persons* of parties to furnish the rule of jurisdiction. Is there any peculiar magick in *injunctions*, that the legislature made a distinction between them and other cases? No: but it was necessary to promote the speedy distribution. The face of every bill showed the name of the court whose judgment was enjoined, and afforded a convenient rule for

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distribution of the papers, which could not be given in *original suits.*

The residence of the *defendant* should furnish the rule of jurisdiction. It is better for the *complainant*, who is about to force the defendant into a court of equity, to go to his place of residence, than *vice versa.* Suppose a defendant at common law resides in one extreme part of the State, and the plaintiff in another. The court is where the defendant at law resides. He goes into his chancery court, in his own town. He shows his order of injunction to the sheriff; but does not send a subpœna to be served on the plaintiff at law. Years may elapse before he may hear of it; especially if he has an inattentive attorney, as is too commonly the case. But, if you make the *person* the rule of jurisdiction, the complainant in equity should be compelled to send his subpœna to be served on the person of the plaintiff at common law.

But it is said that, upon our construction, there may be three trials of the same injunction. All this might happen; but similar abuses have happened under the former law. A man applies to a Chancellor, and gets an injunction, which is afterwards dissolved. He then goes to a county court, and, *concealing that fact*, gets another injunction. If determined on delay at any rate, he might act in the same manner with the several Chancellors; but he would obtain delay, until the fact of the prior dissolution was known, and no longer. This argument has therefore no weight; for, whichever way the court may decide this question, frauds of this nature, for the sake of delay, may continue to be practised.

Mr. *Wickham* relies on the circumstance, that the clerk of the court of common law is to endorse on the subpœna that the bond is filed, as putting him under the control of the Court of Chancery: but this question I think immaterial.

The clerk is as much punishable for contempt of the chancery court if he resides *out of the district*, as if *within the district.*(*h*) Therefore the argument makes rather against Mr. *Wickham.*

(*h*) Revd. Code. 1 vol. p. 429, ch. 298, sect. 5.

The case of *Ambler* v. *Wyld* actually shows that one county court sitting in chancery may *revise* the judgment at law of another: and *Ford* v. *Gardner*(*i*) proves that a county court, in its equitable jurisdiction, may *revise* the judgment of a *district* court. Why should not a county court have the right of enjoining the judgment of another county court?

(*i*) *Ante* p. 72.

It is not on the ground that one court says to another "you have done wrong;" but that the same questions could not come before one court *at common law* that come before the other *in equity*. The reason that no such injunction ever has been granted is that the defendant always prefers applying to the court of the county, where he resides, and at the greatest possible distance from the residence of the plaintiff.

Mr. *Johnson* concluded with observing that, as Mr. *Wickham* had referred to the argument of Chancellor Taylor *in his favour*, he with equal confidence relied on that of Chancellor Brown, which he considered a better argument than his own.

Wickham, in reply. *Some court* must have the jurisdiction. It is, therefore, not sufficient for Mr. *Johnson* to show that the *Staunton* District Court has it not; he must also show what other court has it. He says, that if the injunction is obtained where the plaintiff at law resides, he may have notice; otherwise not. But, if an injunction be obtained against a man, in *Pittsylvania* for example, does it make any difference as to his knowledge of it whether it was granted in *Richmond* or *Staunton*?

I contend, if Mr. *Johnson's* argument of concurrent injunctions be correct, (for he is obliged to admit concurrent injunctions, upon the ground he takes,) that a man may obtain three several injunctions to the same judgment, not surreptitiously, but stating the case fairly and fully. If the residence of the plaintiff at law is to give the rule, the *defendant* may suffer great inconvenience, since his property may be seized by an execution, and he may be driven to a distant court to obtain an injunction. But, according to this doctrine, in cases where the place of residence is unknown, or uncertain, where is the injunction to be obtained?

It is said that no injury would result from one county court's enjoining the judgment of another. There would be rare sport among the county court magistrates, if this was the case.

Friday, October 30th. The Judges delivered their opinions.

Judge Tucker. The record exhibits the singular case of two Chancellors in different districts disclaiming juris-

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diction of a case brought before them by a bill of injunction to a judgment rendered in the District Court of *Charlottesville*. The Chancellor of the Richmond district, it is alleged in the bill, refused to grant the injunction, although the defendants all resided *within* his jurisdiction, because the court, whose judgment was sought to be enjoined, was *not within* his jurisdiction. The Chancellor of the Staunton district granted the injunction, but dismissed the bill afterwards, because, although the court which rendered the judgment sought to be enjoined was *within* his district, yet *none* of the defendants resided *therein*.— This court has been favoured with the reasons of both Judges in support of their respective opinions; and I think it must be confessed, the reasoning of both is very strong, if not perfectly convincing. My own opinion is that BOTH *may be right*, there being, as I think, a *casus omissus* in the law, which the legislature only can remedy. But as I understand the rest of the court to entertain a different opinion, I can, without difficulty, subscribe to it; especially as the only object of the inquiry is where to apply for a remedy in similar cases.

Judge ROANE. I will premise—1. That the rule, that all statutes in *pari materia* are to be considered, in forming a construction upon any subject, applies emphatically in this case, where the two principal Acts which come in question are nearly cotemporaneous, and avowedly parts of the same system; and, 2ndly, that a construction ousting a portion of our citizens of all equitable jurisdiction shall not lightly be made in any case; much less in *this*, in which the legislature seems anxiously to have wished not only to preserve rights already existing, but to extend and improve them.

By the 7th section of the Act of January 1802, the chancery courts thereby established were vested with "the "same jurisdiction and powers, *within their respective* "*districts*, in all and every matter and thing, as the High "Court of Chancery possessed on the first day of January "1802, including (*inter alia*) the *granting injunctions*, &c., "subject only to the same constitutional and legal restric- "tions and limitations as the said High Court of Chan- "cery was then bound by." The restrictions here alluded to I understand to relate, principally, to the nature of the case, (that is, that it must be an equity-case, and not a law-case,) and to the *amount* of the sum in question.

Prior to the establishment of this new system, the High Court of Chancery could have granted injunctions to any judgment rendered within the limits of its jurisdiction; and this is now also the case with the several County Courts in Chancery who grant injunctions to their own judgments; without any inquiry, in either case, as to the residence of any defendant. It would seem a natural construction, therefore, and conformable to a general principle, if a like power was deemed to belong to the several Chancery Courts, as to all judgments rendered within their respective districts. The 7th section of the Act of January 1802, standing singly, is ample to confer this power; but in making a construction upon the subject, we must take into consideration every part of the same and other acts touching the premises.

It is said that the 12th section of the Act of January 1802, which gives leave to a plaintiff to sue within a district in which one of several defendants resides, relates also to injunctions, and controls the construction of the 7th section; and that injunctions, therefore, shall not be granted by the Judge of the court, unless one of the defendants resides within the district. This provision in the 12th section seems analogous to the proceeding against absent defendants under our Act, where it is necessary that *one* defendant should reside within the State:—but in that case the proceeding is by an *original suit* in equity; and this circumstance, alone, would be pretty strong to denote that the suits, intended in this last clause, were suits of the same character; viz. *original suits* in equity.

If, therefore, the construction in this case depended solely upon this Act of January 1802, I should doubt extremely whether the operation of the 12th section would narrow that of the 7th, on the point in question, and whether the said 12th section relates at all to injunctions; more especially as the general chancery law of 1792, (which now applies within the several districts, as it before applied to the commonwealth at large,) while it lays down the restrictions to the obtaining of injunctions, is totally silent as to the residence of the defendant. But this construction does not depend solely upon the Act of January 1802;—we receive great light upon this subject from the Act of 2d February 1802, passed only ten days thereafter, and avowedly supplementary to the former. By the 1st section of that Act, the clerk of the High Court of Chancery, in arranging and allotting to the several Chancery Courts "THE CAUSES AND SUITS depending in

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"the said High Court of Chancery on the 1st of February "1802" is to have regard to the residence of the *defendant*, or defendants, as the case may be: and by the 6th section thereof, in sending out the "papers in all *injunctions* depending therein on the 1st of February 1802," in ascertaining to what Chancery Court they shall be allotted, he is to be governed by the locality of the law Court, in which the judgment enjoined was obtained;—so, by the 4th section, "all injunctions *awarded* by the judgment of the "High Court of Chancery previous to the first of Febru- "ary 1802 may be issued by the clerk of said court in "like manner as if the Act of January 1802 had not passed, "to be arranged and allotted as is prescribed in other "cases of injunctions therein after mentioned," viz. as is prescribed by the 6th section just noticed.

A review of the several sections of this Act of February 1802, shows evidently that, under the general terms "*causes and suits*" in the 1st section, injunctions were not comprehended, for they are provided for by another section; and that, in allotting *injunctions* to the several Chancery Courts, no respect is had to the residence of the defendant, but only to the general principle before noticed; that is, to the court in which the judgment enjoined was rendered.

These words "*causes and suits*" in the 1st section of the Act of February 1802, are fully as extensive as the word "*suit*" mentioned in the 12th section of the Act of January 1802; and yet *they* are incontestibly explained by other parts of the same Act to mean suits, other than injunctions. Wherefore then shall the 12th section of the Act of January 1802, (taking all the Acts into consideration,) be construed to *abridge* a power given by ample words in the 7th section of the same Act, and either introduce a principle entirely *new* in our code in relation to injunctions, (respecting the residence of the defendant, rather than the court in which the judgment was rendered,) or withdraw from (perhaps) a numerous class of cases, all equitable jurisdiction whatsover.

I have said that the general principle of our laws was that the locality of the law court determines the equitable jurisdiction. There is nothing in the Act of January 1802, singly considered, which abandons this principle; and, on the contrary, the Act of February 1802 seems strongly to support it. In most cases the restraint upon the clerk of the law court is amply sufficient for the complainant; for without the act of the clerk no execution can go upon the

judgment; and, this being the case, the defendants, wherever residing, will find their interest in coming in, submitting to the jurisdiction, and moving to dissolve the injunction. If, before the clerk of the law court receives notice that an injunction is awarded, he has, in fact, devested himself of his power, by actually issuing the execution into *another* district beyond the limits of the Chancery Court, I am not at present prepared to say whether the process of the court may not pursue the execution, on the general principle that, where a jurisdiction exists, every necessary power shall be implied, to carry it into complete effect. If so, no difficulty whatever can exist in the case: but, if otherwise, the fault is with the plaintiff in the injunction, who has delayed to apply to the Court of Equity, or to serve, or give notice of its process, until after the execution has gone beyond the limits of the district. But, even in that view of the case, the plaintiff, although he might resort to other remedies, is also entitled to his injunction, to avail him *quantum valere potest.*

Upon the whole, I think there is nothing in this case which should induce us to depart from the general principle of our laws upon this subject, which respects the scite of the law court in determining the equitable jurisdiction. Some inconveniences may arise from this construction, under certain circumstances: but inconveniences certainly exist under a contrary construction; and, especially, in creating a *concurrence* of jurisdictions in favour of *several* Courts of Equity, and carrying parties defendant into districts extremely remote from the original scene of controversy. My opinion, therefore, is, that the plea in this case ought to have been overruled, and the cause sustained.—With respect to costs, as the shape which the cause assumed was evidently imposed upon the appellee, with a view to settle an important general principle, if we had power, I should be of opinion to divide them;—but I believe that the Act establishing this court (*a*) is imperious, that costs shall be recovered by the party prevailing.

(*a*) Rev. Code 1 vol. p 63, ch. 63. sect. 19.

Judge FLEMING. The only question in this case is, whether the Court of the Chancery District, of *Staunton* had jurisdiction to grant an injunction to a judgment at law rendered *within*, but where the plaintiff resided *without* the district? or, in other words, whether the jurisdiction of the court is local and permanent, or mutable and fluctuating all over the State, and must vary according to the residence of a contending party?

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Previous to the month of January 1802, the High Court of Chancery had general jurisdiction over the whole State, and was considered as always open, so as to grant injunctions, writs of *ne exeat*, *certiorari*, and other process usually granted in vacation.

The business in the said court having accumulated in an extraordinary degree, it was by the Legislature thought expedient, for the more speedy and convenient administration of justice, to branch it into three distinct courts, assigning to each a particular district, *within which* the Judges were, respectively, as well in term time as in vacation, to exercise the same jurisdiction and powers as the High Court of Chancery, or the Judge thereof, possessed, or might have exercised on the 1st day of January 1802. But, in my conception, neither the said courts, nor the Judges thereof in vacation, possess any jurisdiction or powers, *without* the limits of their respective districts as established by law.

With respect to injunctions,—in the 6th section of the Act of February 1802, supplemental to the Act, passed a few days before, concerning the High Court of Chancery, it is provided that the papers in all injunctions depending in the said High Court of Chancery, on the 1st day of February 1802, should be sent, with copies of all orders and interlocutory decrees therein made to the Chancery Court of that district within which the judgment enjoined was rendered; without any regard to the residence of any, or either, of the parties: and it appears to me, indeed, that, when once a suit is commenced and prosecuted, the parties appearing, either plaintiff or defendant, are always supposed to be in court, until the business is finally determined.

Suppose that this suit, instead of having been brought in the District Court of *Charlottesville*, had been in the County Court of *Albemarle*, which is held at the same place, and the defendant had shown good equitable cause for enjoining the judgment; could not that County Court, with propriety, have enjoined the judgment, without regard to the residence of *Pollok*, the plaintiff, who, it seems, resides within the chancery district of *Richmond*? Certainly it might: and, if so, I can perceive no reason why the Chancery District Court of *Staunton* should not exercise the same powers. And, suppose an appeal, on either side, from the decision of the County Court on the injunction, to what district would the appeal have properly lain? To the district of *Staunton*, undoubtedly. And why?—

Because the jurisdiction is local, and the judgments at law, as well as the decision of the County Court on the injunction would both have been within that district, notwithstanding all the parties reside within the *Richmond* chancery district.

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If the appellants had obtained an injunction from the Judge of the *Richmond* District Court, with an order to the clerk of the District Court of *Charlottesville*, where the judgment was rendered, to suspend the issuing an execution, or to the sheriff, (in case one had been issued,) to stop all further proceedings thereon, neither of those officers would have regarded such order; because it would have been extrajudicial, as coming from a tribunal having no jurisdiction or control over the judgment at law.

Much has been said as to the inconveniences that would, or might, arise from this construction of the law; but I conceive it might be easily shown that a contrary construction would be productive of still greater inconveniences; but, however that may be, it is the province of the Legislature, and not of the judiciary, to provide a remedy for the evil, if one really exists.

I am of opinion, upon the whole, that the demurrer to the plea to the jurisdiction of the court was improperly overruled; and that the decree, dismissing the bill, ought to be reversed.

Judge LYONS concurring in the opinion delivered by the two last Judges, the decree of the Superior Court of Chancery for the *Staunton* district was reversed, and the cause remitted for further proceedings.

PATTY and others, paupers, *against* COLIN and others.

Tuesday, 3rd Nov.

A testatrix emancipated her slaves by her will, and directed that a certain tract of land should be sold for the payment of her debts,

On an appeal from a decree of the Superior Court of Chancery for the *Richmond* District, pronounced in May, 1807, whereby the bill of the complainants was dismissed.

Patty and her children *Daniel* and *Anderson* filed their bill in equity, stating that they were formerly the slaves of *John Timberlake*, and were sold after his death for the purpose of raising funds to satisfy his debts; that *Frances Timberlake* his widow became the purchaser, and emanci-

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pated them by her will, of which she appointed *B. H. Hilliard*, *Richard Hilliard*, *Mary Day* and *Francis Hilliard* executors and executrix; that the said *Richard Hilliard* administrator of *John Timberlake* and executor of *Frances Timberlake* had sold the complainants to *Colin*. The prayer of the bill is for the benefit claimed under the will, and for general relief.

The complainants by amendment to their bill stated that *Frances Timberlake* by her will, charged her lands with the payment of her debts; that those lands were in the possession of *B. H. Hilliard*, (whom they prayed to be made a party,) and sufficient to refund the price paid by *Colin*. Another amended bill was filed against *Richardson*, administrator, with the will annexed of *Frances Timberlake*, praying for an account of her estate.

and that certain monies due her should be applied, when collected, to the same object.

To the original bill *Colin* answers, that *Frances Timberlake* died more indebted than she was worth, and therefore could not emancipate the complainants; that *Patty* and *Daniel* were sold by the sheriff to satisfy an execution against *John Timberlake's* estate, and *Richard Hilliard*, who is not executor of the said *Frances Timberlake*, became the purchaser, of whom the defendant, at the request of the complainant *Patty*, bought her and her son *Daniel;* that the complainant *Anderson* has been born since the said purchase; that the complainants were exposed to sale by *B. H. Hilliard* and *Frances Timberlake*, executor and executrix of *John Timberlake*, and the said *Frances Timberlake* NOMINALLY became the purchaser, but no money was paid for them, so that she still remained a trustee for the creditors of *John Timberlake*.

The land was sold for *ready money* by her administrator with the will annexed after advertising the time and place (without specifying the *terms*) of sale for ten *days only*, and purchased by himself, before any judgment was obtained against her estate. The slaves were afterwards sold under an execution.

After the filing of the original bill, and before *B. H. Hilliard* was made a party, his deposition was taken. He proved that *Frances Timberlake* became the purchaser of the complainants *Patty* and *Daniel*, but paid no money for them; that he had paid a large sum for *John Timberlake's* estate, and that the complainants were sold under an execution of *Richard Hilliard's* against the said estate, all of which, including sundry other negroes, had been sold, and was not sufficient to pay all the claims against it. His answer to the amended bill making him a party, and stating that he was in possession of the land devised by *Frances Timberlake* for the payment of her debts, admitted the fact; but said, that the lands were fairly and publickly sold for cash, at auction, and *Richardson* became the pur-

On a bill brought by certain of her slaves claiming the benefit of her will, and suggesting fraud in the management of her estate, it was de-

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chaser, at £95, of whom he bought them at the price of £100; and that the whole of *John Timberlake's* estate both real and personal was not sufficient to pay his debts.

The answer of *Richardson* to the amended bill filed against him, stated that he had fully administered the assets of *Frances Timberlake* according to an account annexed; *which was accepted by the complainant's counsel, instead of an account before commissioners.*

In the progress of the cause the Court of Chancery directed an account of the value of *Frances Timberlake's* lands to be taken by commissioners, who reported that the lands given her by her husband *John Timberlake* were worth £250.

creed that the lands be resold, and an account taken, and, if there be not funds sufficient to pay the debt for which they were sold, that they *be sold for a term of years to satisfy it.*

Several depositions were taken, which proved the sale of the complainants by *John Timberlake's* executors, and the purchase by *Frances Timberlake*, who does not appear to have qualified to the will, though she was named executrix. There was no proof that any money was paid by her; and most of the witnesses express their *belief* that the negroes were sold to prevent an execution from being levied on them, and for the sole purpose of keeping them together. It appeared from sundry copies of judgments filed as exhibits in the cause, that the estates, both of *John Timberlake* and *Frances Timberlake* were much involved in debt. *Mrs. Timberlake*, however, in her will, speaks of a debt due to her from *B. H. Hilliard*, and directs that it shall be applied, when collected, to discharge the very claim under an execution for which the complainants were sold: she also mentions other monies due to her, and disposes of her estate in such a manner as to induce a belief that she was not conscious of being in debt. Her will bears date the 6th of April, 1794: and, on the 30th of November in the same year, *B. H. Hilliard* obtained from her a receipt in full of all demands on account of the estate of *John Timberlake* her late husband.

In the answer of *B. H. Hilliard* to the amended bill charging him with being in possession of the land devised by *Frances Timberlake* for the payment of her debts, he enters into a very lengthy detail, to show that the sale of her land by *Richardson* was a fair one; he states that the situation of her estate imperiously demanded that it should be sold for *cash;* that it was publickly advertised at several places, and purchased by *Richardson*, her administrator with the will annexed, at £95; from whom he purchased it at £100. As an evidence of the fairness of the sale,

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and the publicity which was given to the transaction, one advertisement was proven to have been set up at a meeting house; in which advertisement *Richardson*, on the *25th of November* 1797, notified the sale of the land *at Allen's tavern*, (stated by *B. H. Hilliard*, in his answer, to have been a very publick place, about five miles from the premises) *on the fifth of December following:* this advertisement specified that the land would be sold for the purpose of paying the debts due from the estate of *Frances Timberlake*, and that *the terms would be made known on the day of sale.* It was from the answer of *B. H. Hilliard* alone, that in this cause, those terms were disclosed: the sale appearing, from that answer, to have been for *cash.* A receipt from *B. H. Hilliard*, as executor of *John Timberlake*, to *Richardson* as administrator, with the will annexed of *Frances Timberlake*, for the sum of £95, (the price at which the land was struck off to *Richardson*,) expressing the application of the money, in payment of a debt, for which he (*Hilliard*) was bound, as the surety of *Frances Timberlake*, was produced in evidence.

The Court of Chancery, on a hearing, dismissed the bill, and the complainants appealed to this court.

Randolph for the appellants.

Call for the appellees.

For the appellants, it was said that, although this was a claim for freedom, yet the cause would be discussed as if it were a mere question involving the right of property; but the relief must be different, and according to the subject-matter. The appellants have made out a case which clearly proves a conspiracy on the part of the representatives of *John* and *Frances Timberlake* to deprive them unjustly of their freedom. Sufficient funds were provided by Mrs. *Timberlake* to ensure the emancipation of her slaves. Besides the credits mentioned in her will, she directed her lands to be sold, if necessary, for the purpose of paying her debts. These lands, reported by commissioners appointed by the High Court of Chancery to have been worth £250, were sold by *Richardson* her administrator with the will annexed, for *cash*, after advertising them for ten days only, and purchased by *him* at £95, from whom they were bought by *B. H. Hilliard* at £100. The relief contended for, is, that there be an account of

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the estate of Mrs. *Timberlake* taken, and that the lands be resold; and, if there shall be enough to pay *Colin* the amount which he paid for the negroes, they shall be emancipated. There is an account filed showing that her estate was fully administered; but, still, there is a sufficient fund in the land. Admitting that the slaves were sold by *B. H. Hilliard* as the executor of *John Timberlake*, and purchased by Mrs. *Timberlake* for the mere purpose of protecting them from execution, still *Hilliard* being a party to the fraud, cannot be relieved. The receipt obtained by *B. H. Hilliard* from Mrs. *Timberlake* is of itself an evidence of fraud. Her will is dated in April 1794, and the receipt in November 1794, probably when she was on her death bed. She releases to him, in character of executor of *John Timberlake;* but not a word is said about the slaves. He was indebted to her, and took this release to exonerate him. The negroes were in her possession, at the very moment of the release, and, if it had been contemplated, (as he pretends,) that her right to them should be relinquished, surely something would have been said about them. Although it is generally true that an executor may sell a specifick legacy, and convey a title to the purchaser, yet the rule only applies where compensation can be made in money. Here it cannot be made, because liberty is in question.

On the part of the appellees, it was contended that the appellants were not entitled to relief: that Mrs. *Timberlake* who had affected to emancipate them had no title, the sale being merely fictitious and fraudulent, and intended to protect the property from the lawful creditors of *John Timberlake*. This was apparent from the whole of the testimony; and, in the language of a majority of the Judges in *Austin's* administrator *v. Winston's* executrix,(*a*) it exhibited such a combination to defeat creditors as rendered the whole transaction void. There is no evidence to show that Mrs. *Timberlake* paid any thing on account of this pretended purchase; and, even if she had, it would have been paid out of the estate of her husband; for it does not appear that she was entitled to any other. Several circumstances show that the sale was merely fictitious: there is no charge in the administration account for those slaves: *Hilliard*, after the death of Mrs. *Timberlake*, caused them to be sold, as if his title as executor had never been devested; there is no proof that either security was given or any money paid for the amount.

(*a*) Ante 33.

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As to *Colin*, the transaction was *res inter alios acta*, and cannot affect him. The property of a testator found in the possession of his executor may be taken in execution by creditors to satisfy their claims; nor is the property changed by a sale made by the executor, at which he becomes the purchaser, unless, after a fair experiment made, it is struck off to him as the best bidder, and he actually pays the money for the benefit of the estate. *Colin*, being a *bona fide* purchaser from a person who bought the negroes at a sheriff's sale, comes within the principle of the 3rd resolution in *Matthew Manning's* case,(*b*) and his possession ought not to be disturbed. In this case a third person has aquired a right, and no fund can be created for the redemption of the slaves; which distinguishes it from the case of *Abbey & Woodliff* in this court.(*c*)

(*b*) 8 Co. 96, b.

(*c*) MS.

But, if Mrs. *Timberlake* never qualified as executrix, it would not influence the argument; because it was a combination between the executor and one named an executrix, who was also residuary legatee, to defraud the creditors. Besides, the court, by a posterior act, cannot compensate the purchaser from the sheriff. Suppose *Colin* gave £ 50 for the slaves, and they are now worth £ 300; he has a right to go back to the vendor for the increased value; how can that vendor come on the publick officer? will the court involve the sheriff in the payment of the increased value, when he acted legally in making the sale?

Whatever claims Mrs. *Timberlake* had, were extinguished by the release of November 1794; the appellants have, consequently, no right to an account. Suppose Mrs. *T.* were alive, and to bring a bill against *Hilliard*, would not that release be a bar? If she could not demand an account against the release, those claiming under her cannot. There is no evidence that the release was fraudulently obtained, as has been suggested.

If *Colin* has acquired a legal right under the sheriff's sale, there is a total inability in the appellants to bring a suit, because they are *slaves*. It may be said that suits in *forma pauperis* are daily brought; but it is because the plaintiffs are *free*.

Another reason why an account should not be directed, is, that an administration-account was not called for in the Court of Chancery. If a party will not ask for an account from a court which has power to grant it, shall he come up to this court, and demand a reversal of the decree. But what good would be effected by directing an

account, when the whole record shows the estate was insolvent?

It is said that a fund rich enough for every object is in the hands of *Hilliard*. How does this arise? *John Timberlake*, overwhelmed in debt, devises a little piece of poor land to his wife; she undertakes to bequeath a great many specifick legacies; she, in truth, gives away the property of her testator; emancipates her slaves, and says that if there be not estate enough to pay her debts, this land shall be sold. Every specifick legatee is equally entitled; for they are all volunteers. If she never paid for this property, then she owed the estate of *J. Timberlake;* she owed *Hilliard* and others. These debts could only be paid by the sale of the land; and, if there were anything left, no legatee could be exclusively entitled to the benefit of it: all that could be done, would be to pay them *pro rata*.

The land was publickly advertised, fairly sold, and purchased by *Richardson*, who afterwards sold to *Hilliard*. The commissioners have, indeed, said it was worth more; but this is mere opinion, and not expressed in the presence of the parties. That report does not bind the appellees, because it was made before *Hilliard* was a party to the cause.

If these people have a right to an account, it is of the administration on Mrs. *Timberlake's* estate alone. They have accepted the account of her administrator, in the same manner *as if it had been made before a commissioner*. This account embraces the land and the whole estate. Mrs. *Timberlake* died insolvent. She had nothing but what she received from *J. Timberlake's* estate. If the sale be not a good one, the slaves are liable to the creditors; and, if good, she is still indebted for them. But the creditors have acquired legal rights; and there is no power in the court to take them away.

Wednesday, *Nov. 25th.* Judge TUCKER presented the following decree, which, he said, had been unanimously agreed to, and contained his own sentiments: "It appearing that a considerable number of the slaves of "*John Timberlake* deceased, of whom the plaintiffs were "a part, were possessed by his widow and residuary le"gatee *Frances Timberlake*, as of her own proper slaves, "more than five years before her death, either under an "actual sale thereof to her by the defendant *B. H. Hil*"*liard*, the executor of the said *John Timberlake*, or "otherwise by the assent and consent of the said execu-

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" tor; by which transaction, if the same were fair and " *bona fide* made between the parties, those slaves were " not thereafter liable at law to be taken in execution to " satisfy any debt recovered against the said executor on " account of his testator: yet, as they were originally " liable for the payment of all the just debts of that tes- " tator; and, if there were any fraud in the sale or trans- " fer from his executor to his widow and residuary lega- " tee; or, if delivered to her in satisfaction of the residuary " legacy bequeathed to her by her deceased husband, they " might still be made liable to the payment of such debts; " and, as the complainants have come into a court of equity " for relief; and since they are moreover liable for the " payment of all the just debts of the said *Frances Tim-* " *berlake;* and the debt due to the defendant *Richard* " *Hilliard*, for satisfaction of which the complainants were " taken in execution, being one of those debts of the said " *John Timberlake* for which they were originally liable, " and which the said *Frances* had probably undertaken " and thought herself bound to pay, as appears by her " will: the seizure and sale of the complainants, made by " the sheriff to satisfy the judgment obtained by the said " *Richard Hilliard*, ought not to be impeached; there is " therefore no error in so much of the Chancellor's de- " cree as dismisses the complainants' bill as to that de- " fendant. But, inasmuch as no inventory, appraisement, " or account of sales, nor any account of debts, if any, " due to the said *John Timberlake*, hath been exhibited " by the said *B. H. Hilliard* his executor, nor any satis- " factory account of his administration thereof rendered " by him; nor any inventory, appraisement, account of " sales, or satisfactory account of the administration of " the personal estate of the said *Frances Timberlake*, nor " any account of debts due by, or to her, having been " rendered or appearing; nor any satisfactory account of " the dealings and transactions between the said *B. H.* " *Hilliard* as executor of the said *John Timberlake*, or in " his own behalf and right, and his sister the said *Frances* " *Timberlake*, being rendered or appearing, whereby this " court can be enabled to judge how far the estate of the " said *Frances* may be liable *in equity* for the debts of her " deceased husband, or *at law* for her own proper debts; " and the sale of the lands of the said *Frances*, though " pretended to have been made for ready money, ' *be-* " *cause the exigencies of her estate so urgently demanded* " *and required it*,' appearing from the exhibits filed in

"this cause, to have been made sometime before any "judgment was obtained against her estate by any per- "son whatsoever; and the said *B. H. Hilliard* having "become the purchaser thereof from the administrator of "the said *Frances*, by whom the same was exposed to "sale, and to whom it is alleged to have been struck out "at a price very inferior to the valuation thereof made "by commissioners appointed by the High Court of "Chancery to value the same, after a notice of ten days "only, published, as alleged, at a single place of worship, "and not notified in the publick papers, or at any other "place, or in any other manner, as far as appears to this "court; that sale ought not to have been considered as "valid *without further inquiry* into the fairness and pro- "priety of that transaction; and, therefore, that there is "error in so much of the said decree as dismisses the "plaintiff's bill as to the other defendants in this suit— "therefore the same is so far REVERSED and ANNULLED; "and this court proceeding to make such decree as the "said Court of Chancery ought to have made, is of opi- "nion that an account ought to be taken of the goods and "chattels, rights and credits, of the said *John Timber- "lake* deceased, and of the administration thereof by the "said *B. H. Hilliard;* (who appears by his own deposi- "tion and acknowledgment to have qualified as his execu- "tor, and to have taken upon himself the burthen of exe- "cuting his will;) and, more especially, of the value of "the slaves sold or otherwise transferred and delivered "to the said *Frances* his widow and residuary legatee by "the said executor, and also of the prices at which they "were struck out to her, at the sale, or pretended sale, "thereof made by the said *B. H. Hilliard;* and whether "such sale was *fraudulently*, or *bona fide* made between "those parties; and upon what terms and conditions said "sale was made; and whether the said *Frances* in conse- "quence of such transaction hath paid or made herself "personally liable to the said executor, or to the creditors "of the said *John Timberlake*, or any and which of them, "for debts due from her said deceased husband, by rea- "son of such purchase, or delivery of the said slaves to "her: and that a like account of the slaves, and personal "estate, of the said *Frances*, at the time of her death, and "of the rents, issues and profits of her lands, and of those "slaves, and into whose hands they have come, either "immediately on her decease, or since, be likewise ta- "ken, and that a fair and just settlement of all accounts,

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" dealings and transactions between the said *B. H. Hilliard* as executor of the said *John Timberlake*, or in his " own right and account, with the said *Frances*, from the " death of the said *John* to the death of the said *Frances*, " be likewise taken; whereby it may be ascertained whether the said *B. H. Hilliard* was the debtor of the said " *Frances*, as by her will is suggested, or she was indebted to him: and that the lands mentioned in the last will " and testament of the said *Frances*, if it shall appear " that the same were not properly exposed to sale and " fairly sold by her administrator, be again exposed to sale " at publick auction, after due notice, in such manner, and " on such terms as to the Superior Court of Chancery for " the *Richmond* District shall seem most likely to produce " the highest price: and, if, after the due execution of the " premises, it shall appear to the said Superior Court of " Chancery that there is sufficient of the estate of the said " *John Timberlake*, and of the said *Frances* his widow, to " satisfy and pay *all* the just debts, as well of the latter, as " of the former, without recourse to the value of the complainants, or to a sale of them for those purposes, that " then the said complainants be considered and declared " FREE, reserving, nevertheless, leave to the other slaves " who were objects of the benevolence of the said *Frances* " in her will to become parties plaintiffs to this suit, and " to assert an equal claim to their redemption and emancipation, and to have the equal benefit of the estates of " the said *John Timberlake* and *Frances Timberlake* in " accomplishing this purpose: If it cannot be wholly accomplished, that then the whole of the said slaves so " claiming their freedom, and applying to be parties plaintiffs within a reasonable time to be limited by the said " Court of Chancery, be sold for such term of years as " may be sufficient to raise the adequate fund; and, if the " whole value of them all be necessary, that then the bill " be dismissed. And that, in the event of an adequate " fund being found as aforesaid, and of the complainants " being declared free, there be paid to the administratrix " of *Didier Colin* fifty pounds (the price by him paid for " the said complainants) with five per cent. interest thereon from the time the same was paid by him; and that " similar recompense in the like event be made to the " purchasers or owners of the other slaves who were " objects of the said *Frances's* benevolence in her will, if " there be sufficient of her estate for that, and the other " purposes beforementioned; subject however, to any

"particular equity which may be established against "them or any of them: and, in case there shall remain "any surplus of the estate of the said *Frances* after the "execution of the premises, that the same be distributed "according to her will. But nothing herein contained "is to be construed to the prejudice of any other specifick "legatee named in the will of the said *Frances*."

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Judge ROANE. I concur in the decree just read, as agreed upon in conference; and as explanatory of my ideas on the case, will subjoin a few observations.

The spirit of the decisions of this court in relation to suits for freedom, while it neither abandons the rules of evidence, nor the rules of law as applying to *property*, with a becoming liberality respects the *merit* of the claim, and the general imbecility of the claimants. On this ground it is, that parties of this description are not confined to the rigid rules of proceeding, and that their claims are not repudiated by the court, as long as a *possible chance* exists, that they can meet with a successful issue. Instances of the former kind are numerous: and, of the latter, it will be seen in the case of *Abby v. Woodly*, (in MS.) that this court only determined against the paupers in the *last* resort, and after every possible source of redemption should be found to have failed.

In the case before us, the spirit of the above principles will induce me to consent that a full account of *Benskin H. Hilliard's* administration on *John Timberlake's* estate shall be taken, under the order of the Court of Chancery, although it is not specially prayed for in the bill; that an account be also taken of *Richardson's* administration on *Frances Timberlake's* estate, although the account stated in the record has been accepted by the appellant's counsel; and that the claim of the plaintiffs be not utterly rejected by the court, until it is found that no possibility exists of effectuating their emancipation. This I will consent to, although, as at present advised by the record, I apprehend that no part of the estate of *John* or of *Frances Timberlake* can be withheld from the payment of their just debts.

As to the question whether the sale of the negroes by *Benskin H. Hilliard* to *Frances Timberlake* was fraudulent, and a mere cover to deceive creditors, I should not pay much respect to *Benskin H. Hilliard's* testimony relative thereto; not only because he was a party to the fraud, if any existed, and ought not to be admitted to allege his

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own turpitude, but, also, because he was, or might have thought himself, interested, in giving that colour to the transaction. The testimony of the other witnesses, as to this subject, is only of their *opinions* and *belief*.

But, in my view of the case, it is not material to decide whether this were a fraudulent, or a *bona fide* transaction. The property in question has been attached and sold under a *regular judgment and execution;* and the party praying relief against it can only be received on the terms of doing justice, that is, of paying a debt which *John Timberlake* owed to *Richard Hilliard*, under whom the defendant *Colin* claims, and which *Frances Timberlake* owed to the estate of *John Timberlake;* having received from his executor the property in question without paying any consideration therefor. It is not unworthy of remark, also, that this debt of *Richard Hilliard's* seems recognized in the will of *Frances Timberlake*, and, in some sense, *adopted* as her own. As to *Didier Colin*, the intestate of one of the appellees, it is not shown that he purchased *mala fide*. He admits it is true, that he had *heard* that the complainants were sold by *Benskin H. Hilliard* to *Frances Timberlake*, but adds that he also heard that she was only *nominally* the purchaser, and had paid *no consideration* for them, and was consequently a *trustee* for *John Timberlake's* creditors: he also states that he had heard that *Frances Timberlake* died more in debt than she was worth, and therefore *could not* emancipate the plaintiffs.

This admission must be taken all together, and being so taken, certainly cannot import that *Colin* had any knowledge of the complainants' *right* to freedom: but, what is still more conclusive is, that this information and understanding on the subject is not applied to the *period* of his purchase, and, therefore, at that time he may have been, for anything that appears, completely ignorant of the complainants' pretensions. *Colin's* administratrix, therefore, is never to lose her lien upon these negroes, until a fund is found for their redemption, in which case she is to be paid the principal money with interest.

My opinion, therefore, is that the decree of dismission be reversed, (unless it be as to the defendant *Richard Hilliard*,) and the cause sustained; that accounts of the administration of both estates be taken, under the order of the Court of Chancery, including a further inquiry, if desired, into the fairness of the sale of the land by *Richardson* the administrator of *Frances Timberlake;* and that liberty be reserved to *any* or *all* of the negroes, whose

emancipation was contemplated by *Frances Timberlake's* will, to become parties to this suit, within a time to be prescribed by the Court of Chancery, and to make the necessary defendants; that, if, in the event of the inquiry to be so instituted, it be found that there is estate enough of the said *John Timberlake* or *Frances Timberlake*, (specifick legacies excepted,) to redeem *entirely* the negroes so becoming plaintiffs, that, in that case, their freedom be declared *absolute* by the Court of Chancery; or, if only in part, that then such parties plaintiff be exposed to sale for such a *period of time* as may raise the funds requisite, and, after the expiration of that period, be declared to be free; my opinion being that all the negroes contemplated by *Frances Timberlake's* will are equally entitled to their freedom, and that they should have it partially, if they cannot receive it absolutely; but, in the event that the *whole values* of the said plaintiffs shall be found to be necessary to pay the debts aforesaid, that then the bill be dismissed, and the legal rights of the defendants remain undisturbed;—and that such of the said slaves, as do not apply to be made co-plaintiffs within the time to be prescribed as aforesaid, be barred of their claim to freedom under the will of *Frances Timberlake* aforesaid.

Judge FLEMING expressed his approbation of the decree which had been reported.

KINNEY *against* BEVERLEY.

Thursday. 5th Novemb.

An ejectment does not abate by the death of the lessor of the plaintiff.

The preliminary question in this cause was, whether after an appeal to this court, from a judgment in ejectment against the tenant, the appeal abated by the death of the lessor of the plaintiff.

Warden contended that an action of ejectment did abate by the death of the lessor of the plaintiff. He was the true and only party in the suit: his title was to be settled: his title was put in issue: and by the strength of his title, not the weakness of his adversary's, he was to recover: if so, this suit, like all others which abate on the death of parties, should abate on his death.

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Again, possession is, in no instance, given to *Timothy Seekright* or the other *nominal* plaintiff, but to his lessor, who is the *real* plaintiff in the action. He cited *Runnington* on Ejectments, 139.—1 *Mod.* 252.—1 *Salk.* 262.—12 *Mod.* 446.—1 *Term Rep.* 491.—2 *Stra.* 1056, which last authority, he observed, would probably be relied upon as sufficient to determine the case against him; but all that the authority proved was that, the real plaintiff being tenant for life only, on his death, his interest was gone, and the only recompense which could be had was in damages.

Why, he asked, is a *scire facias* necessary to revive a judgment?—it is to bring in the legal representatives of the deceased party. Suppose a writ of possession should be awarded; possession could not be delivered to the *nominal* plaintiff, for he is not a real person; nor could it be given to the lessor of the plaintiff, because he is dead. Can the court say who is the heir or devisee of the lessor of the plaintiff, unless he be regularly brought into court?

The Attorney General, on the same side, referred to the following additional authorities: 3 *Tuck. Black.* 205.—*Gilb.* on Eject. 142.—1 *Burr.* 668.—4 *Burr.* 2447.—2 *Bac. Abr.* 412.—1 *Bac. Abr.* 11. He observed, that, if we look into the history of the action of ejectment, it will be found that the courts have endeavoured to get clear of all the inconveniences arising from the introduction of fictitious persons, and now consider the lessor of the plaintiff as the real party. The reason for the abatement of suits, in other cases, applies with equal force in this. It might be attended with serious inconveniences if the doctrine contended for should prevail. Suppose the lessor of the plaintiff should die, leaving a great number of children, as in this case;—to whom is the sheriff to deliver possession? Is he to decide the law, and to determine upon the rights of the parties?

Wickham, on the other side, contended that an action of ejectment never did abate by the death of the lessor of the plaintiff. Every argument drawn from the liberality of modern practice militates against the opposite counsel. One of the effects of this practice has been to get over the inconvenience of abatements as far as possible.

As far as his knowledge extended, as derived, either from his own observation, or the information of others, he said, that he might state the uniform practice to be, on the death of the lessor of the plaintiff, *to give security for*

costs, and go on with the cause. This is the present practice of the District Courts, and Federal Courts, and was the practice of the Old General Court. Look into all the practical books and the same doctrine will be found to prevail.

Not a case cited on the other side, said Mr. *Wickham*, has any bearing on the question, except one in *Strange*, which Mr. *Warden* has been so good as to cite for me. Is there a single *dictum* to be found in the books, which says that the death of the lessor of the plaintiff abates the action?

Here Mr. *Wickham* went into an examination of all the cases adduced by the opposite counsel, and inferred from the whole of them, that, so far from establishing the position that an ejectment abated on the death of the lessor of the plaintiff, the practice was uniformly otherwise; and that, to avoid the inconvenience of abatements, the names of fictitious persons, such as *John Doe*, *Richard Roe*, *Aminadab Seekright*, &c. who never die, had been substituted.

The argument, (which has been urged with much apparent force,) drawn from the inconvenience of making the sheriff a judge of the rights of the representatives of the deceased lessor of the plaintiff, may be met by one of equal weight. A. brings an ejectment for one messuage, one tenement, and one hundred acres of land, without any other description. There may be one hundred tracts of this description, and the sheriff may turn any man out of possession whose land answers to it. The correct answer to the argument is, that the parties act under the control of the court, and the plaintiff must take possession at his peril. *Runnington on Ejectments*, 125. If a person not entitled should come forward, and personate the lessor of the plaintiff he would be in as a trespasser. All that the court could do, in such instances, would be to act in a summary way, and see that its process was not abused.

Warden. The last argument of Mr. *Wickham* is sufficient to show that the suit must abate. Suppose the sheriff were to give possession to the eldest son as the heir of *Beverley*, when he may have made a will, and left the land to his daughters. As to the description of the land, the constant course in this country is to have a survey, pending the cause; and the jury find for the plaintiff the land contained within certain lines marked on the plat, which is referred to in their verdict. By these boundaries the sheriff gives possession. But we are told that no

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can be shown where it is said an ejectment abates by the death of the lessor of the plaintiff:—the reason is, that no person thought it did not. It does not abate by the death of the nominal plaintiff, because he is a fictitious person, and the lessor of the plaintiff is the real party. Who is to give security for costs? the person who has the real interest.

Saturday, 7th November. The Judges delivered their opinions.

Judge TUCKER. I find it laid down in an ancient and respectable authority, that if an action be well begun, and a part of the action determines by act in law, and yet the like action is given for the residue, the action shall not abate, but the plaintiff may proceed for the residue: but where, by the determination of part, the like action does not remain for the residue, there the action, though well commenced, shall abate. As if an action of waste be brought against tenant *per autre vie* who dies *pendente lite;* the writ shall not abate, but the plaintiff shall recover damages only.—So, in ejectment, if the term incurreth *pendente lite*, the action shall proceed for damages only.—*Co. Litt.* 285, a. And this seems to have been settled very long ago: for we are told, that if a man brings a writ of *ejectione firmæ*, the plaintiff shall recover his *term to come* as well as in *quare ejecit infra terminum;* and, if there be no part of the term to *come*, then he shall recover *the whole in damages.* Bro. Abr. *Quare ejecit infra term.* pl. 6.—The case in *Strange* 1056 proceeded upon the same principle—There the verdict found the lessor of the plaintiff was tenant for life; and it was afterwards suggested to the court, upon affidavit, that he was dead, so that the term was ended. But the court refused to abate the suit, because he might proceed for the *whole* in damages. (*Run.* 130, to the same effect. Ibid. 298. The form of the judgment.) This shows that the suit doth not abate for the death of the lessor of the plaintiff. For in the case in *Strange* it would have worked manifest injustice, to have abated the suit after the verdict, when the plaintiff might have recovered damages commensurate to the injury sustained.

That the case in *Strange* is considered in England as having settled the law, there, that an ejectment shall not abate by the death of the lessor of the plaintiff, seems highly presumable from its being twice cited to that ef-

fect in the last edition of *Bacon's* Abridgment, title, ABATEMENT, *letters F* and *I.*

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Judge ROANE. I should never have had a moment's doubt upon this subject, but for the strong expressions in the case of *Aslin v. Parkyn*, 2 *Burr.* 668,—stating that the lessor of the plaintiff and the tenant in possession are the only parties to the ejectment, and that the action for mesne profits, whether brought in the name of the lessor or lessee, is equally the action of the lessor.

I have said, and I still think, that greater respect is due to modern than to ancient authorities relative to the action of ejectment; because this remedy is daily simplifying and progressive. I did not particularly refer to the case in *Strange* as ancient, but also to the cases cited from 1 *Modern* and *Salkeld.* None of these reporters, however, can justly be deemed *modern*, in relation to a remedy invented within a century and a half from this period.

I have looked into the case from *Burrow.*—It relates to an action for mesne profits; and, though it holds that that action may be brought by the lessor of the plaintiff, it also admits that it lies in favour of his lessee. If an action lies in favour of a plaintiff (but for the benefit of another) there is no reason that, the latter dying, the suit should abate, when the former is perfectly competent to carry it to judgment and execution. This case, therefore, may not subvert the whole system on this subject to be found in *Blackstone's* Commentaries, and other modern authorities.

By them we are told that the plaintiff, or lessee, ought to be a *real* person, and not, as is unwarrantably practised, an *ideal fictitious* one; (3 Bl. Com. 203;) that the judgment goes in favour of the *nominal plaintiff* to obtain possession of the land for his *term* supposed to be granted; (Ib. 204, and Append. No. 2, § 4.) and that the title of the lessor is only obliquely and collaterally brought into question in this action. (Ib. 205.)—It is held that the death of the lessor, (he being tenant for life,) does not abate the suit. It is also held, that if the term expires, pending the writ, there is no abatement; (1 *Bac.* 22.) but, in both cases, the action shall proceed for *damages* for the trespass only. The action is both for *possession* and *damages;* although the damages are now usually one shilling, yet they may be made much larger, *by way of increase*, in England. (See 2 Bl. Append. No. 2, § 4.) In both the cases just stated, the lessee's right of possession had expired, and yet he was permitted to proceed for damages. In our case,

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the term stated in the declaration is existing, and the lessee's right to the *term* continues notwithstanding *Beverley's* death; he having been tenant in fee of the land, and therefore competent to grant the interest for the whole term: the plaintiff, therefore, in our case, proceeds both for possession and damages; and this case is consequently stronger than the cases just put. The rule on the subject of abatements, that, wherever the death of any party pending the writ makes *no change* in the proceedings, the writ does not abate, (1 Bac. 11.) is decisive that no abatement exists in the case before us.

When these circumstances are considered; and, especially, when it is considered that regularly judgment is rendered in favour of and possession is delivered to the lessee, who ought, (as is before said from *Blackstone*,) to be a *real* person, the difficulties on this subject vanish. As to the difficulty arising from the death of the lessor; if the *modern practice* be to deliver possession to *the lessor*, he who now stands in his shoes acts at his peril, and under the control of the court.

Judge FLEMING said it was the unanimous opinion of the court, that the suit did not abate.

Friday, 6th. Nov.

The AUDITOR, &c. *against* JOHNSON's executrix.

The answer of the defendant *positively* denying a fact charged in the bill ought not to be outweighed by testimony *not equally positive* on the other side.

A person *losing* a publick certificate bearing interest which

On an appeal from a decree of the High Court of Chancery rendered by the late Judge of that Court.

The bill alleges, that, *Johnson* was the owner of a military certificate bearing interest, which he delivered to *Robert Yancey* to bring down to *Richmond* and obtain a warrant for the interest. That *Yancey* carried it to the auditor's office, who being at that time engaged in some other business, told him if he would leave the certificate, and call again, the warrant should be made out by that time: that *Yancey* did leave it in the office; but, when he called again, it could not be found; and that it hath been entirely lost. That the auditor afterwards told one *Poindexter*, he had heard that Capt. *Singleton* had a certificate of that description, it having been issued as payable to one *Coats*, and for the sum of 47 or £ 48.

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The bill is one of a double aspect;—praying, first, that the auditor may be decreed to issue a new certificate, and to grant a warrant for all arrears of interest; or, if the court shall be of opinion that the commonwealth is not liable for the renewal of the certificate and the payment of interest, in consequence of a loss happening through the negligence or default of the auditor as a publick officer, that he be decreed to make compensation for the loss in his individual capacity.

The auditor in his answer positively denies that the certificate was delivered to him, or that he ever saw it.

Robert Yancey swears "that he applied to the auditor "for a warrant for the interest, but was told it could not "be had, then; that, if he would leave it in the office it "should be made out and given him at a time then men- "tioned: that he, during his stay in *Richmond* made fre- "quent application for the certificate and warrant, but "could not obtain it."

James Poindexter says he was informed by the auditor that Mr. *Yancey* handed him, or handed in, a certificate, and that the interest was made out, and laid on the table, according to the best of his recollection.

On a hearing, the Chancellor dismissed the bill, from which decree an appeal was taken to this court; and the appeal coming on to be heard at the April term 1804, in the name of *Johnson v. Pendleton*, auditor, &c. the decree of dismissal was affirmed, *without prejudice.*

The appellant then supposing that the commonwealth was liable, in consequence of the act of *Pendleton*, who was one of her publick officers, (though he might not be liable in his individual character,) proceeded to another hearing in the High Court of Chancery; previously to which, he executed a release to *Robert Yancey*, who had been the bearer of the certificate, and whose testimony was objected to on that account; and he, moreover, proved by a further examination of *John Carter* one of the clerks in the auditor's office, that the certificate said to have been lost in the said office had been purchased by *George Pickett*, in whose possession he had seen it, but who could not recollect from whom he bought it.

The cause coming on again to be heard in the High Court of Chancery, the Chancellor decreed against the commonwealth, the amount of the certificate with interest; from which decree the *auditor*, in behalf of the commonwealth, took an appeal to this court.

never was transfered to him by actual assignments from the original holder, ought not, by a suit in chancery, to obtain its renewal from the commonwealth, without making the original holder a party to the suit.

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The Attorney General, for the *auditor*, representing the commonwealth, said that this was the same case which had before been decided, on the appeal of *Johnson v. Pendleton*, the late auditor. Neither *Pendleton* in his individual character, nor the commonwealth, whose agent he was, could be liable unless for gross neglect. *Jones on Bailments*, 117, 120. It is not, however, admitted that the commonwealth, would be liable for the act of her agent under any circumstances. The court has already decided, upon the same evidence, that *Pendleton* was not personally responsible. If gross negligence had been proven, in him, he would have been *individually* liable: and this opinion of the court may be considered as decisive of the question.

Randolph, for the appellee. The reservation in the decree in the case of *Johnson v. Pendleton*, the late auditor, shows that the court did not decide the case as to the commonwealth. It is not the same case; but, if it were, the court might consider it as an original suit. *Pendleton* was exempted on the ground that there was no personal claim against him, he having acted as a publick officer in the ordinary routine of his duty. The evidence, too, is different from that on which *Johnson v. Pendleton* was decided. *Yancey's* deposition was objected to before, because he being the bearer of the certificate to the auditor's office was interested in showing how he had disposed of it. This objection has been removed by a release before his last examination. There is also further evidence derived from *John Carter*. In his former deposition, he spoke merely of the *practice* in the auditor's office; in the present, he states that the certificate had been found and sold to *George Pickett*. It is admitted that *Johnson* was possessed of that certificate, in the same manner as others, who drew further certificates from the treasury; such as were entitled to draw interest. The custom at the treasury was, for the person who brought the certificate, to be considered as the actual owner. It was so considered till the case of *Wilson v. Rucker*, 1 Call 500, was decided; and, even after that decision, the bearer was considered as the agent for the owner. This certificate was carried to the auditor's office, in order to obtain a warrant for the interest, and was lost in a publick office. It was an acknowledged debt of the commonwealth, on which the interest was to be paid: and the auditor was the agent of the commonwealth in issuing a warrant for the interest. Compare this to the

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case of a common person: a man says, "Bring my bond to my agent, and he will pay you the interest:" if it be lost is not the principal liable? The auditor, being a publick officer and warned that the certificate which was lost belonged to *Johnson*, ought to have made a minute in his books; andwhen it was brought for final redemption, he ought to have stopped it, and told the holder that it was the property of *Johnson*. In the event of a suit against him, he might have defended himself on the principles of the case of *Wilson v. Rucker*. If the auditor had used common diligence, *Johnson* might have regained his certificate. But, suppose it had never been laid before the auditor, he ought to have given information to the treasurer that it was a certificate issued in the name of *Coats*.

The Attorney General, in reply. All that the court meant to do, by the reservation, in the decree in *Johnson v. Pendleton* was to leave the case open. Although it is an original question as to the commonwealth, yet it is a fair argument to say, that the court having, on similar evidence, decided that *Pendleton* the depositary was not liable; on a parity of reason the commonwealth could not be liable. The certificate might never have come into the auditor's office: it might have been paid into the treasury for taxes, or funded in the United States' loan office. This might have been done by the *holder*, notwithstanding the decision of the court in the case of *Wilson* and *Rucker*. The President, in delivering his opinion, seems to admit the existence of the custom, to transfer these papers by delivery only; and this record supports the position; for *Pickett* was in possession of the certificate without assignment, or even knowing from whom he received it. If *Johnson* were entitled, at all, he ought to have gone against *Singleton*, or *Pickett*, in whose possession he knew the certificate was, and not against *Pendleton*, or the commonwealth.

Curia advisare vult.

Wednesday, 11*th November*. The Judges delivered their opinions.

Judge TUCKER, after stating the case, and observing that it did not materially vary from the case of *Johnson v. Pendleton*, late auditor, &c. decided at the April term 1804, said that it might be satisfactory to refer to the opinion which he then gave. He recited the testimony of *James*

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Poindexter, stating, that he was informed by the auditor that Mr. *Yancey* had handed him, or handed in, a certificate, and the interest was made out and laid upon the table according to the best of his recollection. "This, said "Judge TUCKER, is all the testimony upon that point, and "I feel myself incapable of deciding that this indirect "testimony should countervail the positive denial by the "auditor that the certificate was ever delivered to him, or "that he ever saw it. For *Yancey* does not swear that *he* "*left* the certificate, as the auditor told him he might. "Nor does *Poindexter* swear positively to the information "he received from the auditor, but mentions it only ac- "cording to the best of his recollection, which may pos- "sibly have deceived him, more especially as the answer "of the auditor is positive, and not reconcilable to the "information which *Poindexter* supposes he gave him.

"Were I satisfied upon this point, and there were no "other room for doubt in this case, I should have very "little hesitation in deciding that the commonwealth was "bound to grant a new certificate for the principal and a "warrant for the interest. The auditor cannot perform "his duty, unless the certificate be given up to him, to "examine and compare it with his books, or other means "by which he may know it to be genuine: he is then to "make out a warrant corresponding with it, for the inte- "rest thereon due; he is to make an entry in his books "of his proceedings herein. Can this be done without the "paper being delivered to him? from that moment it is "in the custody of the law, until he has performed all "that may be necessary, and redelivered it to the party, "or his agent. If it be lost, the commonwealth, who is "not only the debtor, but may be regarded as having the "certificate delivered up to it, (being delivered to a pub- "lick officer, for a publick purpose) is bound to recom- "pense the loss. 3 Term Rep. 760 to 763, cited by Mr. "*Randolph;* the general reasoning in which seems to be "sound law. Nor have I much hesitation in considering "*Yancey*, whose credit is not attempted to be impeached, "as a competent and credible witness in this case—It "would be of mischievous consequences to society if it "were ever held that an agent, who does not appear to "have any interest whatever in a transaction, shall be "deemed an incompetent, or not a credible witness, be- "cause, by some act of neglect or inattention during the "transaction in which he has no interest, he may possibly "become liable for damages to the person for whom he

" acts. Here *Yancey* had no interest in obtaining a warrant " for the money for *Johnson*, unless we suppose, what " neither the law, nor any testimony, or circumstance inthe " case will permit us to suppose, that he intended, if ob- " tained, to convert it to his own use. The certificate it- " self being not transferable by delivery only, without an " assignment, strengthens the conclusion in my mind. " The case in 1 *Salk.* 289, cited by Mr. *Randolph*, is stron- " ger than this. There a son, who had embezzled his " father's money, was permitted to prove the delivery of " it to the defendant, against whom the father had brought " an action of trover for it, the testimony of the son being " corroborated by other circumstances. And in 2 *Strange* " 507 cited also by him, an original debtor was allowed " to prove a payment of the debt, by the plaintiff in that " suit, at the request of the defendant, in behalf of the " debtor. And the case in *Buller* 77, cited by Mr. *Call*, " does not, I apprehend, apply to the present: for if the " master suffer in damages by the fault of his servant, the " servant will be liable over to the master, against whom " the damages for this fault may have been recovered, for " the amount. The case of *Lucas v. Haynes*, 2 L. *Ray.* " 871, is a parallel case; where the person who carried a " bill of exchange endorsed in blank to the drawee for " acceptance, was admitted as a witness to prove the de- " livery: and held in K. B. that he might.

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" But although *Yancey's* testimony, had it gone further, " would have weighed with me in opposition to the audi- " tor's answer, if supported by other circumstances, yet " taking it as it stands, I cannot think it sufficient to over- " balance the auditor's answer, even with the aid of *Poin-* " *dexter's* evidence, on which I have already said enough. " Nor can I think, even were the evidence more satisfac- " tory, the auditor liable, unless in case of actual malfea- " sance, which is not charged.

" But, were I satisfied upon this point, of the actual de- " livery of the warrant *into the auditor's office*, in any man- " ner usually observed in the office in similar cases, I " should still doubt upon another.—Whether the complai- " nant is entitled to a renewal of this certificate (which, by " his own showing, was issued to one *Coats*, and made out " in his name,) without making the original proprietor a " party in the cause. For, in *Wilson v. Rucker*, 1 *Call*, " 514, it is expressly laid down as the unanimous opinion " of the court, '*that the property in these papers will* " *not pass by delivery without assignment.*' The complai-

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"nant hath not shown, nor even stated in his bill, that he "was assignee of *Coats*, though he claims the property in "the certificate. Under the decision in *Wilson v. Rucker*, "he could, at most, only have an equitable title, united with "the possession; but the legal title, even in that case, would "have been in *Coats*.

"Can this court decree a renewal of the *legal* evidence "of a debt due from the commonwealth, which is not in "its nature transferable by *delivery* only, to be made to one "who does not show a *legal* title, without calling upon the "*legal* proprietor to assert *his* claim.(*a*) I apprehend "not,—and, therefore, think that the decree of dismissal "must be affirmed; but I am willing that it should be done "without prejudice." As to the present case of the *auditor v. Johnson's* executrix, Judge TUCKER was of opinion that the decree be reversed.

(*a*) See L. V. Edw. 1785, Octo. 1782, c. 1, s. 1, 5, May, 1783, c. 8, s. 12, 14 & c. 38, s. 8, as these certificates.

Judge ROANE said that he had perused the case, as formerly decided by this court, and could not perceive any variations in it. He was, therefore, of opinion that the decree be reversed.

Judge FLEMING. This appears to be in substance precisely the case of *Johnson v. Pendleton*, decided in this court, the 4th of May 1804, with this small variance in the evidence which does not affect the merits of the cause. In that case *John Poindexter* deposed that *John Pendleton*, then auditor of publick accounts, informed him that he had discovered in the hands of Capt. *Singleton* a certificate which Mr. *Johnson* said he had lost, or words to that effect;—and in the present case, *John Carter* in his affidavit saith that, after the time when the certificate was said to be lost or mislaid in the auditor's office, the said certificate was purchased by and in the possession of *George Pickett* who said he could not recollect of whom he bought it, as he had made no memorandum in his book to show that particular circumstance.

The decree is therefore erroneous, and is to be reversed.

EDWARD BLAND, administrator, with the will annexed, of *E. Bland*, deceased
against
JOHN & AGNES WYATT, infants, by *John Trizveant* their next friend.

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Tuesday, 10th. Nov.

A bill was filed on behalf of certain infants against the *heirs* of their guardian who died intestate, the sheriff to whom his estate was committed, (no administrator having qualified,) his surviving security in the bond given for the performance of his duty as guardian, and the admr. of the other security, as *Co-defendants*. No process having been served on a part of the *heirs*, nor on the surviving security, a decree against the administrator of the deceased security was decided to be erroneous, because there were not *proper parties convented* before the court; and the cause was remanded for fur-

The appellees, by their next friend, filed their bill in chancery in the County Court of *Prince George*, against *Benjamin*, *George*, *Robert*, *Samuel*, *Ann*, *Mary* and *Agnes Cocke*, as coheirs of *Pleasant Cocke* deceased, and against *Edward Bland* as administrator with the will annexed of *Edward Bland*, deceased, and *Edward Wyatt;* setting forth, that the said *Pleasant Cocke* after his qualification in the year 1780, as guardian to the appellees and their sister *Mary*, orphans of *Hubbard Wyatt* deceased, took into his possession the landed estate of the appellee *John*, several slaves, and some other personal estate of both the appellees and their sister *Mary*. That, in 1781, the sister *Mary* died under age, intestate, and without having been married; whereby her slaves descended to the appellee *John* as her heir at law, and her mere personal estate became subject to distribution between the surviving brother and sister, which however they have never received. That *Pleasant Cocke* as their guardian, for thirteen years and upwards possessed and managed their said estates, which were productive and profitable, and received considerable sums from the hire of the slaves and rent of the land. That in the year 179- the said *Pleasant* departed this life intestate, without having rendered an account of his guardianship. That his widow *Mary* obtained administration on his estate; and soon after her qualification, the court of Prince George appointed commissioners to state and settle the accounts of *Pleasant Cocke's* guardianship. That the commissioners proceeded to examine the books, accounts and papers of the said *Pleasant* relative to the said guardianship; which were laid before them by the said *Mary*, or with her concurrence, and returned their report thereon, which was approved and recorded; by which it appears that there was due to the appellee *John* £631 3 7¾, which was payable December 5th 1794, 4000*lbs* tobacco payable January 1st 1782, with interest until paid, and the further sum of £29 3 10¾, payable December 5th 1794, and 1565*lbs* of tobacco payable January 1st 1782, which last mentioned money and tobacco accrued from the hire of the slaves which *John* inherited from his sister *Mary:* and that there ap-

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peared to be due to the appellee *Agnes*, £412 8 7½, payable December 5th 1794, and 2455*lbs* of tobacco, payable January 1st 1782, with interest thereon till paid. That the appellees have never received payment of these sums of money and quantities of tobacco. That they instituted a suit in chancery against *Mary Cocke* the administratrix, touching the premises which abated by her death. That no person has qualified on *Pleasant Cocke's* estate since her death; whereby the appellees found themselves compelled to resort to his heirs aforesaid,—to the appellant as administrator with the will annexed of *Edward Bland* deceased, and to *Edward Wyatt;* which *Edward Bland* deceased, and *Edward Wyatt* were securities for *Pleasant Cocke's* guardianship. The bill then prays that the defendants may discover the quantity and quality of the personal estate subject to distribution which came to *Pleasant Cocke's* hands; that they may state an account of the rents and profits of the lands, and hire of the slaves; that they may say that the accounts returned by the commissioners contain all the credits to which the appellees are entitled in law or equity; that the court may decree the sums of money and quantities of tobacco abovementioned with interest thereon to be paid by the defendants or some of them—and for general relief.

ther proceedings.

A court of chancery ought not to decide upon Accounts mutually existing and controverted between the parties, without referring such accounts to a commissioner or commissioners to report thereupon.

An amended bill suggests; that since the institution of the suit, *Pleasant Cocke's* unadministered estate had been committed to *Billy Hailey Avery*, sheriff of Prince George county, and prays that he may be made a party defendant.

The answer of *Benjamin Cocke*, one of the coheirs, admits that his ancestor undertook the guardianship of the appellees and their sister *Mary* now deceased, and possessed himself of the slaves bequeathed to them by their father *Hubbard Wyatt.* That his guardianship accounts were laid before commissioners, but that injustice was done his estate by their report, as they undertook to fix a *stipulated price* to several negroes, which was erroneous and unreasonable; and did not allow the guardian any compensation for his management—prays that new commissioners be appointed and the accounts re-examined; that even if the money reported be decreed, interest may not be allowed upon it from the time when it was returned, as that would be interest upon interest. That he knows nothing of the accounts prayed for, though he has possession of the books, papers, and accounts of his ancestor which were in the hands of his administratrix; that he is ready to deliver them to whomsoever the court may decree

to be entitled to them. That he knows not the quantity or quality of *Mary Wyatt's* estate, not having in his possession any personal property belonging to the appellees or the said *Mary*, or to his ancestor—nor can he account for the rents and profits of the lands of the appellee *John*, being unacquainted therewith.

The answer of the appellant sets forth, that he is unacquainted with the rents and profits arising from the estate in the bill mentioned, but that *Pleasant Cocke* died seized of land sufficient nearly, if not entirely, to pay off the demands of the appellees, which ought to be liable to the payment thereof before his testator's assets; and objects to a decree for the amount reported by the commissioners with interest thereon from the time of their adjustment, as by that means they would obtain interest upon interest.

The answer of *Billy Hailey Avery* the sheriff, states that he has been unable to collect or possess any property of *Pleasant Cocke* or any of his papers.

No process was ever served on *Robert*, *Samuel*, *Ann*, *Mary* and *Agnes Cocke*, or on *Edward Wyatt*.

Before any answers were filed a decree *nisi* was entered against the other defendants; but it does not appear to have been served on the defendant *George Cocke*.

The cause (which is stated in the record to have been heard *on depositions and exhibits filed*, though none such form any part of it,) was heard before the county court, who decreed that the appellee as administrator of *Edward Bland* deceased, should pay to the complainant the sums and quantities of tobacco reported by the commissioners beforementioned as due to the appellees from *Pleasant Cocke*, the tobacco to be settled at 20*s* per cwt. with interest according to the prayer of the bill. The court then, in the same decree, dismissed the bill as against *Benjamin Cocke* and *Billy Hailey Avery;* and "it further appearing from the return of the sheriff that the subpœna issued in this cause has not been executed on the other defendants except *George Cocke;* it is therefore ordered that the bill be dismissed as to them and *George Cocke*"—and that the appellant as administrator as aforesaid should pay to the appellees their costs.

To this decree the appellant obtained a supersedeas from the Judge of the High Court of Chancery, for the reasons in his petition set forth; who afterwards however affirmed the decree of the county court—from which decision an appeal was entered to this court.

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G. K. Taylor, for the appellant, assigned the following as errors in the record and proceedings, as well as in the decree of the County Court and Superior Court of Chancery:

I. That the appellees had full redress at common law on the guardian's bond, and ought not to have brought a suit in equity.

II. That, having brought such suit, however, in which they pray for a discovery as to the rents and profits of their estates, the court ought to have decreed such account to be taken.

III. That the County Court ought to have given no decree on the report of commissioners, appointed at the instance of the appellees by their guardian, and who, so far at least as the appellant was concerned, proceeded *ex parte*.

IV. That the County Court ought not to have entered any decree in the cause until all the coheirs of *Pleasant Cocke*, and *Wyatt* the appellant's co-security were before them.

V. That the County Court ought not to have dismissed the suit against *Pleasant Cocke's* heirs, whose lands were assets to be applied in equity as well as at law to the discharge of the appellant's demands; and against whom a decree ought to have been rendered in the first instance to prevent circuity of action, since the securities, if sufferers, might have recourse against them on account of the same real assets descended to them.

VI. That the decree of the County Court is further erroneous, in not directing the appellant to pay the sums adjudged against him, out of his testator's goods and chattels, and in giving full costs (including a lawyer's fee) against him.

VII. That the Chancellor, in deciding on a record from the County Court of which the exhibits therein particularly referred to, formed no part, committed an error.

Mr. *Taylor* observed that the record was replete with error; but it would be unnecessary to insist on all the points which he had made, since the want of parties and the mannner in which the decree was entered would be sufficient to reverse it.

Only a part of the defendants appeared and answered. They contested the report of the commissioner, and offered to show wherein it was erroneous, but the court would not permit them.

The court ought not to have pronounced any decree till all the parties interested, as well those in being, as the representatives of the deceased, were brought before them. One of the great advantages of a court of chancery over that of common law, is, that the representatives of a deceased person may be united with a living one in the same suit, if it be necessary, in order to do complete justice. So far from waiting till all the proper parties were brought into court, the decree was entered when the process was served upon a part of them only; and the suit was dismissed against the representatives of *Pleasant Cocke*, and a decree given against the representatives of his security.

The decree was rendered that *Edward Bland* administrator with the will annexed of *Edward Bland* should pay the debt: not out of the estate of his testator, but, in the same manner as if it had been his own proper debt.

A decree has been pronounced upon an account, and that account made no part of the record.

Call, for the appellees, submitted the case without argument.

Curia advisare vult.

Friday, November 13th. Judge FLEMING, President *pro tempore*, delivered the following as the decree of the court, "That the decree of the said Superior Court of "Chancery is erroneous in this,—that there were not "proper parties convented before that court; and, if there "had, in not directing an account between the parties of "the matters claimed in the bill, before a commissioner "or commissioners: Therefore, it is decreed and ordered "that the decree of the said Superior Court of Chancery "be reversed and annulled, and that the appellees pay to the "appellant the costs by him expended in the prosecution "of his appeal aforesaid here. And this court proceeding "to make such decree as the said Superior Court of "Chancery ought to have made, is further of opinion, "that the decree of the County Court is also erroneous "in proceeding to a hearing of the said cause, before all "the defendants had been properly proceeded against; in "prematurely dismissing the bill as to some of the de-"fendants; and in not directing such an account as "abovementioned. Therefore, it is further decreed and "ordered that the said decree and proceedings of the

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"County Court be likewise reversed and annulled down "to the replication, and awarding of commissions to take "depositions, as to the defendants who have answered; "and down to the writs, as to the defendants who have "not answered; and that the appellees pay to the appellant "his costs by him expended in prosecuting his appeal in "the said Superior Court of Chancery: and further it is "ordered that the cause be put again on the rule docket "of the County Court, or the Superior Court of Chancery "for the *Richmond* District, as the Judge of the latter "court may direct, in order to be further proceeded in: "for which purpose the said cause is remitted to the said "Superior Court of Chancery."

Thursday, 12th. Nov.

M'RAE's Executors *against* WOODS' Executor.

After two concurring verdicts for the same party, on an issue directed by the chancellor to be tried at common law, he is not bound to direct a new trial, notwithstanding both verdicts were in opposition to the opinions of the judges before whom the issues were tried, and a virdict had originally been rendered in favour of the other party.

This cause was heretofore in the Court of Appeals, and is reported in 2d *Washington's* Reports, p. 80. The statement of Mr. *Washington* will, for the most part, be pursued as far as it goes, and the circumstances which have since attended the case, will be added. This case first came into the Court of Appeals as an appeal from the High Court of Chancery, in a suit instituted there by *Richard Woods*, the testator of the present appellee, against *Philip M'Rae*, the testator of the present appellants. The bill filed by *Woods* states that the complainant, in the year 1769, had a lottery, the highest prize in which was some improved lots in *Charlottesville*, and a tract of land, which property, in the scheme of the lottery was estimated at £ 440. That *Roderick M'Rae* purchased two tickets, *Henry Mullins* one, to which the plaintiff added another, the whole forming a joint property in which *Roderick M'Rae* owned one half. That one of the partnership tickets, No. 69, drew the highest prize, and was therefore entitled to the property abovementioned. But the ticket so soon as its good fortune was known, was forcibly taken from the said *Roderick M'Rae*, by the defendant *Philip M'Rae*, who claimed the entire benefit of the prize. That the plaintiff and *Mullins* having sold their interest in the prize to *Roderick M'Rae*, the plaintiff conveyed the whole property to the assignee of *Roderick*. That about fifteen years after this, the defendant, *Philip M'Rae*, commenced a suit

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against the plaintiff at law, and, in the absence of the plaintiff's witnesses, who could have proved the tortious manner in which the plaintiff acquired the possession of the ticket, a verdict was rendered against him for £ 451 18 4 damages, for the whole value of the ticket. The bill prays an injunction to the judgment at law.

The answer states that half the ticket in question was purchased by *Roderick M'Rae*, for the defendant, the day before the drawing, and that, after it was known to have been fortunate, it was delivered to the defendant by the said *Roderick*. That the defendant never claimed more than one half of the prize drawn by this ticket.

The evidence as to the right of *Philip M'Rae*, and the manner of his obtaining possession of the ticket, is extremely contradictory.

The subject of dispute was submitted to arbitration by the two *M'Raes*, as appears by the testimony of some of the arbitrators, and a decision was given in favour of *Philip M'Rae's* title to one half of *Roderick's* interest in the prize. One of the jurymen who tried the cause, deposes that his intention was to give damages for the *whole value* of the ticket. Another juryman deposes that the jury gave to the defendant, *Philip M'Rae*, damages for the *interest which Roderick M'Rae held in the ticket*. The declaration in the action at law, claimed the whole ticket, and the verdict was general, "That the defendant did assume upon himself as the plaintiff hath declared against him and assessed the damages to £ 451 18 4."

The Chancellor upon the hearing of this cause, directed the issue between the parties in the action at common law to be tried again; from which decree the defendant *M'Rae* appealed. In the Court of Appeals the decree of the Chancellor was affirmed. This decree being affirmed, the issue directed by it was tried in the *Charlottesville* District Court, and was found in favour of *Woods*. But the Judge having certified his dissatisfaction with the verdict, the Chancellor directed the issue to be tried again in the District Court at *Richmond*. On this trial the jury found a verdict for *Woods*, and the court certified that in their opinion the verdict was against evidence.

Upon the first trial of the *issue*, the deposition of *Milly Oglesby*, which was stated to operate strongly in favour of *M'Rae*, and was not before the Court of Appeals, was read. Additional evidence was adduced on both sides. The second issue was tried upon the evidence contained in the papers filed in the High Court of Chancery. The injunc-

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tion obtained by *Woods* was decreed to be perpetual: from which decree the present appeal was taken.

Randolph, for the appellants. If this had been the case of a single trial, according to the precedents of a Court of Chancery, the cause ought to have been sent back, on the Judge's expressing his dissatisfaction with the verdict. (1 Wash. 336.) What difference then does the second trial at common law make when the Judge, who presided, certifies that the verdict was contrary to evidence, and that there was no testimony in addition to that contained in the papers which came from the High Court of Chancery? A Court of Chancery may send out issues till the conscience of the Judge shall be satisfied; and the question is, whether it ought to be *satisfied* when the Judges of common law say they are *dissatisfied*. But the Chancellor, on the testimony of *Milly Oglesby* ought to have decided in favour of *M'Rae* without directing a third issue. If that testimony had been before the Court of Appeals, the original verdict would not have been disturbed.

Wickham, for the appellee. The original verdict in favour of *M'Rae* was for the *whole* of a lottery ticket, when he was not entitled to more than *one fourth*, if to anything. Those Judges of the Court of Appeals, when the case was brought up before, who gave any opinion as to the merits, did not think that *M'Rae* was entitled to more than *one fourth;* and if the verdict had been for one fourth of the ticket, it is probable that they would not have been disposed to disturb it; but all the Judges were of opinion that a new trial ought to be granted. There was a great variety of contradictory evidence in the cause; and the additional testimony of *Milly Oglesby* was probably weighed by the jury. When there is such contradictory evidence, the court ought, with extreme caution to interfere. It would be no disparagement to the learning of the Judges to say, that cases of this kind emphatically belong to the decision of the jury, who, knowing the characters of the witnesses, are better enabled to determine on the degree of credibility to which they are entitled, than the Judges possibly can be from merely *hearing them* give their evidence in court.

A Court of Chancery will not grant a new trial on the mere certificate of the Judge.(*a*)

(*a*) 3 Call, 568, *Ross v. Pines.*

After the trial at *Charlottesville M'Rae* did not choose to trust to a jury of the vicinage, but brought his case to trial at *Richmond*, where a jury of strangers concurred

with the jury of the vicinage. As to the *power* of a Court of Chancery to grant even five new trials, such a thing may exist, but it ought not to have been exerted in the present case. Under all the circumstances of this case, it would have been a mere mockery of the trial by jury to have directed another issue.

Hay, in reply. There appear to have been three verdicts in this case; in one instance there was a verdict for *M'Rae*, and in two others, for *Woods*, both of which were in opposition to the opinions of the Judges. The scales were therefore equipoised. The Judges, if not better judges of *men*, are certainly better Judges of *facts*,—better able to take a comprehensive view of a complicated subject. Juries, perplexed with the cause, and more perplexed with the arguments of counsel, and not seeing their way clear, often find for the defendant without investigating with accuracy the merits of the cause. He could see no reason for departing from the principle laid down in *Southall v. M'Keand*,(*b*) where the court say, "that the verdict in "the District Court ought not to stand, upon the certificate "of the Judges, that the weight of evidence was against "it: since it is unusual for the Chancellor to be satisfied "with such a verdict." This decision applies as emphatically to a case after the second verdict as the first.

(*b*) 1 Wash. 336.

Curia advisare vult.

Thursday, *November* 19*th*. The Judges delivered their opinions.

Judge TUCKER. The history of the occasion and progress of this suit is given in 2 Wash. Rep. 80. Since that period there have been two new trials—One at *Charlottesville*, where the cause of action, if any, arose: the other at *Richmond*, eighty miles distant from the scene. In both, the jury found verdicts for the defendant at law: but, before either of their verdicts were rendered, a jury had been impannelled three days, without being able to agree, and were finally discharged. The Judges before whom the trials were had, certified, in the first instance, that, upon the whole, in the opinion of the court, the evidence on the part of the plaintiff outweighed that of the defendant; in the second instance the Judges' certificate declares that, no evidence was introduced in addition to that contained in the record now before us, and that, in their opinion, the

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verdict was contrary to evidence. This has imposed upon this court the necessity of inspecting that evidence. There is a prodigious mass on both sides, which it is impossible for me to reconcile; such is the opposition between the evidence for the parties respectively. Ignorant of the characters of all the witnesses, (which were perhaps known to the jurors,) I know not whom I ought most to credit or discredit. I must therefore confide in the opinion of the jury, who are the constitutional judges in such cases. More than twenty years have elapsed since this suit was instituted; and fifteen years passed over before the plaintiff was confident enough in the justice of his claim to assert it in a court of law, although all that time in possession of the fatal ticket, which has been the apple of discord for eight and thirty years. I think it high time to say—*Interest Reipublicæ ut sit Finis Litium;* and therefore am for affirming the decree whereby the plaintiff's judgment hath been perpetually enjoined.

Judge ROANE. Upon the principles which seem to have governed the court in the case of *Ross v. Pines*, 3 Call, 568, I am of the same opinion. The concurring verdicts of the two juries ought to conclude this matter. The first jury was probably acquainted with the characters and credibility of the witnesses; and the last jury were probably strangers to them all; yet both have reprobated the plaintiff's pretensions.

Juries are certainly the best judges of credibility; and, as was said by this court in the case of *Ross v. Pines*, it would be vain to resort to the verdict of a jury, if their verdicts were perpetually to be set aside, until they corresponded with the opinions of the courts before which they are taken:—then it would be the opinion of the court, and not of the jury, which would govern the decision of the Chancellor. In further corroboration of my opinion in this instance, I will mention that, in the former decision of this case by this court, one Judge seems to have expressed no opinion as to the extent of the appellant's right; another said, that, at most, it was only to one fourth; and the President said his impressions were that the appellant had *no title*. On the ground therefore of these opinions, in addition to the two concurring verdicts, I think that the decree of the Chancellor should be affirmed.

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Judge FLEMING. This is precisely the case that was before this court at the October Term 1795, reported in 2 Wash. p. 80; with this only difference, that the deposition of *Milly Oglesby*, which I think not material, was read on the first trial of the issue, but was not in the record exhibited to this court. There has been a second trial of the issue ordered by the Court of Chancery, and the verdict again in favour of the appellee, with both of which I am perfectly satisfied, whatever may have been the impressions of the courts before which those issues were tried.

I think it high time the parties were at rest, as it is now thirty eight years since the origin of the controversy; during fifteen of which, the appellant's testator, though living in the county, quietly acquiesced in the possession of *Roderick M'Rae*, and of those who claimed under him, before he asserted his claim to the premises in a court of justice. I therefore concur in the opinion that the decree making the injunction of *Woods* perpetual is correct, and ought to be affirmed.

Decree of the Court of Chancery AFFIRMED, by the unanimous opinion of the Judges.

BOWYER, &c. *against* LEWIS.

Monday, 16th. Nov.

An appeal ought not to be allowed *by this court* from an order of a superior court of chancery rejecting a motion to allow a bill of review, where the right of property had been decided and a writ of *habere facias possessionem*

In this case, the court requested that counsel would argue the preliminary question whether an appeal could be allowed *by this court* from an order of a Superior Court of Chancery, rejecting a motion to allow a bill of review, where the *right* of property had been decided, and a writ *of habere facias possessionem* awarded, but an account remained to be taken, and the report of the commissioners had not come in: in short, whether an appeal would be allowed, till the decree was, *in all respects*, made final.

After the affirmance of the decree, in this cause, it was certified to the Superior Court of Chancery for the *Staunton* District; and, upon the certificates being presented to the Judge of that court, the defendants petitioned for a bill of review, for *new matter* alleged to have been discovered since the rendition of the original decree in the High Court of Chancery; which motion was overruled without

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costs. The court then proceeding to carry the decree of the High Court of Chancery into effect, as affirmed by this court, awarded a writ of *habere facias possessionem* to the appellee, and appointed commissioners to make an inquiry and settlement of some accounts between the parties, and subjected the property to be sold for ready money, to pay any balance which might be found due to the appellant from the appellee.

To the order of the Superior Court of Chancery overruling the appellant's motion for a bill of review, an appeal was allowed by this court and a supersedeas awarded to the writ of *habere facias possessionem*.

awarded, but an account remained to be taken, and the commissioner's report had not come in.

Warden contended that a bill of review would lie after a decision by this court, upon the ground of a discovery of *new matter*. There was a wide distinction between a bill of review *for errors appearing on the face of the decree*, and for *new matter* discovered after the rendition of the original decree. In the former case, the whole record having been inspected by this court, they had it in their power to judge whether the decree of the Chancellor was correct or not; but, on a bill of review brought for the discovery of new matter, this court could not have decided upon it, because the new evidence was never submitted to the court before. Would it be proper to put the parties to the expense of a new suit, when the object might be equally attained by a bill of review; and even if a new suit were brought, the decree might be pleaded in bar? Would it not be making a court of *equity* a court of *iniquity?*

Note the diversity between a bill of review, and a supplemental bill, in the nature of a bill of review.

In this case the Chancellor directed a writ of *habere facias possessionem*, and that a settlement of some small accounts between the parties should be made. The question before the court was, whether the property belonged to the plaintiff or the defendants. Is it right that the property should be changed, while the court is waiting to see whether a small sum of money is due or not?

In England there is no instance of a decree being considered final, or capable of being carried up to a court of appeals, till it is signed and enrolled. What is called a signing and enrolling there? When everything which relates to the cause has been finished; whenevery account has been taken. But, in this country, when the Court of Appeals consisted of all the Judges, and the Court of Chancery of three Judges, it was customary, when the latter court had decided the *merits*, to bring up the cause to the

Court of Appeals. This was done for the sake of expedition, and of justice. The court never refused an application for an appeal, till the decision of the case of *M'Call v. Peachy;* when it was determined that that appeal was prematurely brought up. The consequence of which decision was, that an Act of Assembly passed, which authorised the Chancellor to grant an appeal at his discretion. In all cases where the Court of Chancery allowed an appeal, this court considered themselves as possessing jurisdiction. This decree was *final so far as it respected the merits.*

Let not precedents from the English courts be brought to bear upon the present case. Their practice is entirely different from ours. There is no danger of injustice being done there, because no proceedings can be had under the decree till it be made final.

Wickham, on the other side, said that he should proceed in the argument upon the supposition that a case had been made out which would entitle the party to a bill of review, if it had been brought at a proper time. He should not contend that a bill of review would not lie for *new matter* discovered after an affirmance of a decree by this court. This has been decided by the Chancellor,(*a*) is conformable to the practice in England, and he was not prepared to controvert it. But he should contend that a bill of review will, in no case, lie till a final decree. In England, it will not lie till the parties are completely out of court. Before that period, if new matter be discovered, the party is permitted to file a supplemental bill in the nature of a bill of review.(*b*)

(*a*) *M'Call v. Graham & Beall, ante* p. 13.

(*b*) *Mitford's Pleadings* 78 to 82—2 Atk. 40. *Lewellin v. Mackworth*—*Hinde's Practice* 60—3 *P. Wms.* p. 371. *Taylor v. Sharp.*

It is understood to be admitted by Mr. *Warden* that the English authorities are opposed to the allowance of a bill of review before a final decree, but he supposes there is a distinction between the courts of England and this country, because appeals are allowed here from interlocutory decrees. If *this court* possessed the power of allowing such appeal, there might be some weight in the argument; but it possesses no such power; the power resides entirely in the Chancellor, who may exercise it, or not, as to him may appear right.

But it may be said, this is a mere matter of form: that although no bill of review will lie in England, yet a supplemental bill, in the nature of a bill of review, may be brought. When the cause is at an end, and a bill of review is offered and rejected, the party, being out of court, may appeal: but, if the bill of review be offered and re-

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ceived, the defendant in the bill of review cannot appeal from that order, because it is not final.

The distinction, between a bill of review, and a supplemental bill in the nature of a bill of review, is this: a bill of review forms no part of the proceedings in the original cause; but is offered after the suit is completely ended; a supplemental bill in the nature of a bill of review supposes an existing cause; is received and incorporated with the papers in that cause, and may be regarded as an amended bill: all the orders taken on such bills are considered as orders in an existing cause, and the new bill and answer are part of the same cause. This order for a supplemental bill in the nature of a bill of review is, in its own nature, interlocutory; or, if the bill be rejected, the order is nevertheless interlocutory. Suppose the Chancellor had gone on, and had decreed the property, without receiving the supplemental bill when offered, would not this court, on an appeal, after the final decree, take notice of the rejection of the supplemental bill, as an interlocutory order in the cause? and might not the decree have been reversed because the supplemental bill was improperly refused?

With respect to the writ of *habere facias possessionem*, there can be no question but that it went to award the *possession*, and not to determine the *right*. At the final decree, the Chancellor might have changed the possession. There were many things to be done before the decree could be made final. By the decree, Mrs. *Lewis* was to have an account of rents and profits; and *Bowyer* and others, an account of interest: she was probably put in possession to stop the interest. The practice of filing supplemental bills in the nature of bills of review is also convenient to the parties: for the Chancellor may find it necessary to change his orders; but if a bill of review be offered and rejected, it may be pleaded in bar.

Randolph, in reply. It is admitted by Mr. *Wickham* that a bill of review will lie after an affirmance, upon the dicovery of *new matter*. I will concede that it will not lie for *error in law*. But whether, in this case, the bill was properly brought or not must depend on our own laws, and not the practice of the courts of England. In England a bill of review will lie whenever an appeal may be taken; and an appeal can only be taken *there* after a final decree; but, in this state, as an *appeal* will lie from an interlocutory decree, if the merits be settled, on the same principle may

a *bill of review* be brought in the same stage of the proceedings.

According to Mr. *Wickham's* doctrine, a man may have a *right* to property, may ultimately have a decree in his favour, and yet may be turned out of possession, and kept out for many years.

Whenever the law allowed appeals in cases where the *principle* of the decree was settled, *quoad hoc* the decree was final. Why then should not such a decree be considered final, as it respects the allowance of a bill of review?

The case of *M'Call v. Peachy*, was decided before the act passed—authorizing the Chancellor to allow an appeal, at his discretion, from interlocutory decrees; and the decision of that case gave rise to the act.(c) But, it is said, the Chancellor is alone to judge: the answer is, that a man is to be relieved when an injury *may be done;* he is not to wait till it actually occurs. Here an injury *has been done.* If the argument could have any force it must be applied to those cases only where the Chancellor had made no election: but in this case, an election has been made.

(c) See Rev. Code, vol. 1. ch. 223, pa. 375.

If it be said, that a supplemental bill, in the nature of a bill of review, may yet be received, I answer, that the Chancellor has already expressly awarded a writ of *habere facias possession*, which has had its full effect. In no other mode can the party obtain relief but by the allowance of a bill of review.

Curia advisare vult.

Wednesday, November, 18th. The Judges delivered their opinions.

Judge TUCKER. A decree of this Court affirming a decree of the High Court of Chancery, in this cause being presented to the Chancery District Court at Staunton, pursuant to the Act of Assembly, 1801, c. 14, "and the same being seen and inspected," the defendants petitioned the Court for a bill of review, for *new matter* alleged to have been discovered, since the rendition of the decree in the High Court of Chancery: which motion was overruled, without costs. *After which*, the court proceeded to award a writ of *habere facias possessionem* to the appellee, and to appoint commissioners to carry the decree of the High Court of Chancery so affirmed in this Court, into effect. On the petition of the appellants to this Court, an appeal was allowed them to the order of the court overruling their

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motion for a bill of review, and a supersedeas to the execution of the writ of possession.

To decide whether the bill of review ought to have been granted at that stage of the proceedings, it may be proper to look into the nature of the decree affirmed; whether that were a *final*, or only an *interlocutory* decree.

That decree settled the subject in dispute between the parties as to the *right* which Mrs. *Lewis* had acquired to become the purchaser of the lot in question of *William Bowyer*. But it proceeded further to direct an inquiry and settlement between the parties, to be made by commissioners; and a payment, under penalty of a cousequent sale of the lot for ready money, to satisfy the appellant *Bowyer* for any balance that should appear due from the appellee: and the commissioners were directed to report their proceedings to the court. Until this was done, the cause could not be said to be *out of court*, and consequently, the decree *not final*. It is true an appeal had been allowed in that case—but this is to be attributed to the ordinary practice, until the case of *M'Call* v. *Peachy*, 1 Call, 55, occasioned a solemn inquiry into the legality of that practice, and a decision against it, by the unanimous opinion of the four presiding Judges. The Act of 1797, c. 5, passed soon after, allowing the High Court of Chancery, upon any interlocutory decree, where the right claimed may have been affirmed or disaffirmed, to grant, IN ITS DISCRETION, an appeal, if that court should be of opinion that the granting such appeal would contribute to expedition, the saving of expense, the furtherance of justice, or the convenience of the parties. "The right of deciding upon such an application is exclusively confided to the discretion of the Chancellor, so long as the cause remains in his court."

The authorities cited from *Mitford's* Pleadings in ch. 78 to 84, clearly show that a bill of review, properly so called, is granted only after a final decree, either upon error in law appearing in the body of the decree itself, or upon discovery of *new matter*. If, then, this be a proper bill of review, predicated on the ground that a *final* decree had been pronounced in the cause, I think it was premature;—the cause being still in court, and subject to the Chancellor's future direction and discretion upon every point not already decided upon by this court upon the appeal. On the other hand, if this bill be a supplemental bill, only, in nature of a bill of review, the admission or rejection of it by the Chancellor, whether properly or

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improperly decided could only be decided upon by this court after a *final* decree shall be had in the cause, unless the Chancellor in his discretion had granted an appeal from the order of admission, or rejection. This he has not done; and, as this court has no jurisdiction, but what is expressly granted to it by statute; nor can obtain it in any *other* mode than the statute allows, I conceive the former order of this court granting to the appellant an appeal, and awarding a writ of supersedeas, was not authorized by any statute, and, therefore, ought to be rescinded now, and the appeal dismissed.

The case of *M'Call v. Peachy* furnished a precedent on which I rely.

Judges ROANE and FLEMING were of opinion that the appeal and supersedeas were prematurely awarded: and by the whole court (absent Judge LYONS) the appeal was DISMISSED.

ELDRIDGE and another *against* FISHER.

Tuesday, 17th. Nov.

This was an appeal from a judgment rendered by the District Court of Brunswick, in favour of the appellee, against the appellants on an ejectment for 618 acres of land, lying in Brunswick county, on the following case, agreed by the counsel of the parties:—On the 5th day of April, 1784 *James Fisher*, by his last will and testament which is duly made and recorded in the County Court of Brunswick, devised, among other things, as follows: "I give and bequeath to my loving son *James Fisher* the land below my Spring Branch, and the land I bought of *Charles Gordon*, and the land I bought of *Mason Bishop*, with the following negroes, namely: *Ball*, *Sall*, and all their children and their increase; with one feather bed and furniture; with half my mill to him and his heirs forever; *and if my son James Fisher should die without a lawful heir*, my will and desire is, that my grandson *James Fisher*, the son of *Jonathan Fisher*, may have the above mentioned lands and the half of the negroes, to him and his heirs forever: and the other half of the negroes, my will and desire is, that my grandson *Benjamin Fisher*, the son of *William Fisher*, may have to him and his heirs forever."

A testator by his will made in 1784, devised certain lands, *with personal estate in the same clause*, to his son and *his heirs forever*; "*and, if my son J. F. should die without a lawful heir*," remainder over to the testator's grandsons. It was decided that the first devisee J. F. took an estate tail which was

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converted into a fee simple by the Act for docking entails.

The testator died the same year, and *James Fisher* the son entered into the lands, and held them till he died in the year 1800, intestate, and without any child, and without ever having been married; whereupon the grandson *James Fisher* the son of *Jonathan Fisher* (and the present appellee) to whom the lands were devised over in remainder, brought this ejectment against the appellants, who are the *heirs at law* of *James Fisher* the first devisee. The District Court gave judgment in favour of the remainder-man *James Fisher* the grandson, and an appeal was taken by the *heirs at law* to this court.

Hay, for the appellants, considered this case as fully decided by the case of *Hill v. Burrow*, in this court.(*a*) The question presented by the clause of the will of the testator in this case, is the same which arose in *Hill v. Burrow*. The devises are the same in substance, and almost the same in words: in that case, the limitation over was "*in case my son Thomas Hill dies without a lawful heir;*" in this, the limitation depends upon these words, "*and if my son James Fisher should die without a lawful heir:*" the very words used by the testator, on the construction of whose will, the case of *Hill v. Burrow* turned.

(*a*) 3 Call, 342.

G. K. Taylor, for the appellee. *Stare decisis* is a rule which I hold in as much respect as any man in the commonwealth; but there are cases in which it may be necessary to depart from it:

1st. When there have been decisions plainly contravening former decisions, the court will not carry them further than imperious necessity demands.

2dly. While the courts, in deciding a case, will respect principles, they will pare down, by degrees, the authority of precedents till they are brought to the standard of common sense. As a proof of this, we may refer to cases decided in the time of *Lord Cocke* and *Levinz*, when the limitation of a chattel was not allowed; those limitations are now common.

3dly. When there is a political change in a country which would render the original rule inconvenient, the courts will not consider themselves bound by it.

If this case had arisen on a will made before the revolution, I should give up the subject as a desperate one. If it had been a decision on a case arising since the revolution, and a case of *land only*, after the case of *Tate v. Tally*, I should approach it with great trepidation.(*b*)

(*b*) 3 Call, 394.

If the court will look at the will, they will find that the limitation of the lands is coupled with the bequest of the slaves and personal estate, and under *the same disposing words*. They will find that the same verb (*have*) governs three several nouns, *lands*, *slaves*, *and personal estate*. It is impossible to suppose that the testator meant to dispose of his real and personal estate differently. If it can be proven that this would be a good executory devise, as it relates to the slaves, then it would follow that the testator meant the same thing as to the land.

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Here I shall be opposed by the case so often resorted to of *Forth v. Chapman*(c) and I admit that Lord Chancellor *Parker* said he would construe a will one way as to *realty*, and another as to the *personalty*. But he expressly says that he did it to effectuate the general intention of the testator. In the present case, the application of the rule will destroy that intention. If we attend to the statement of the case of *Forth v. Chapman*, we shall find that, if the Chancellor had not given that interpretation, the children could not have taken the land. Now, although the courts will be *astute* to carry into effect the testator's intent, yet surely they will not to destroy that intent. In the case of *Forth v. Chapman* an estate *for life only* was given in the first instance. The same principle which was adopted in that case is recognized in *Sheffield v.* Lord *Orrery*.(d)

(c) 1 P. Wms. 667.

(d) 3 *Atk.* 288.

If there were nothing in this case but what appears in *Tate v. Tally*, I should surrender the cause; but what I contend for, is, that, there is *personalty* involved in the same devise with the *realty*, which circumstance ought to give effect to it as an executory devise, and, as the courts in England will construe devises as to realty and personalty differently *in order to effectuate the intention of the testator*, for the same reason the courts of this country will not construe wills so as to defeat the intention.

[Judge ROANE observed, that the same doctrine had been contended for in *Tate v. Tally;* and Judge TUCKER declared that he could not distinguish this case from *Hill v. Burrow*, and *Tate v. Tally*.]

Mr. *Taylor* perceiving that the opinion of the court was against him, observed, that he would not press the argument further.

Wednesday, 18*th November*. By the whole court, (consisting of Judges FLEMING, ROANE, and TUCKER) the judgment of the District Court was REVERSED.

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Judge TUCKER expressed himself as follows: "Every point in this cause has been so fully discussed both by the bar, and the court in the case of *Hill v. Burrow*,(e) (which I cannot distinguish from this, except as to the date of the will, which, in that case was antecedent to the Act for docking entails;) and in the case of *Tate v. Tally*, (f) as to preclude all further discussion upon them, without leaving the decisions of this court in a state of perpetual fluctuation. I am therefore of opinion that the judgment be REVERSED, and a judgment entered for the defendants in the ejectment.

(e) 3 Call, 342.

(f) 3 Call, 354.

CHESHIRE *against* ATKINSON.

Tuesday, 24th. Nov.

Wickham moved to quash the supersedeas which had been awarded, in this case, to the sheriff of *Cumberland* County on the second day of the last term, (ante p. 210) because it had been improperly issued, and, as he supposed, without a view of the whole case.

A supersedeas awarded by this court was decided to have been improvidently granted, because it went to stay proceedings on the judgment of a *County Court*, and not of any of the Superior Courts of law or equity.

It appeared, from the record, that there had been an injunction in the High Court of Chancery to a judgment of the County Court of *Cumberland;* that the injunction had been dissolved, and afterwards the bill of the complainant dismissed; from which decree of dismission an appeal was granted, in vacation, by the present Judge of the Superior Court of Chancery for the *Richmond* District; but no supersedeas was awarded by him. The supersedeas awarded by this court at the last term, being directed to the sheriff of *Cumberland* and restraining him from further proceedings on the judgment at law of that court, was in effect, Mr. *Wickham* contended, the granting of a new injunction by this court; because it tied up the sheriff's hands, and prevented him from levying the execution. All that the supersedeas could have reached were the costs of the suit in chancery, which were decreed against the complainant, upon dismissing his bill; the injunction having been previously dissolved, the judgment at law, of the Court of *Cumberland* was left free to operate.

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Judge TUCKER was of opinion that the supersedeas had been improperly awarded not only for the reasons stated by Mr. *Wickham*, but because he did not conceive the Supreme Court of Appeals had power to award such a writ to stay proceedings on a judgment or decree of a *County Court;* that being the province of the Superior Courts of common law and chancery within their respective jurisdictions. He was therefore of opinion that the supersedeas be quashed.

Judge ROANE concurred in the opinion that the supersedeas had been improvidently awarded. He remarked that the attention of the court had been drawn to a mere point of practice, whether a supersedeas which was merely auxiliary to the proceedings of this court could be awarded in open court, notwithstanding the Act of the last session. The record was not opened at the last term, and the process, of course, had been awarded without due consideration.

Judge FLEMING concurred.

By the whole court (Judge LYONS being absent from indisposition) the supersedeas was quashed.

FISHER'S executor *against* DUNCAN and TURNBULL. *November.*

On the trial of an issue, on the assumpsit for the *testator* within five years, an assumpsit of his *executor* cannot be given in evidence, to prevent the operation of the act of limitations.

The *sufficiency* of the evidence ought to be left *wholly* to

The principal questions decided in this cause were, 1st, Whether in an action upon the case against an executor charging an assumpsit of the testator, and on the plea of *non assumpsit* BY THE TESTATOR within five years, the repeated promises *of the executor*, within five years, to pay the debt could be given in evidence so as to take the case out of the statute of limitations; and 2ndly, How far a court may instruct the jury as to the *sufficiency* of evidence.

The suit was originally brought in the County Court of Prince George, by the appellees against the appellant, as executor of *Daniel Fisher*. The declaration contained five counts,—1. *Indebitatus assumpsit* for goods sold and delivered to the testator;—2. *Quantum valebant* for the same;—3. A count for money lent and advanced, paid, laid out and expended for the testator;—4. *Quantum me-*

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ruit for meat, drink, and clothes furnished testator's son; —5. *Insimul computassent* between the plaintiff's and defendant's testator. Plea, *non assumpsit*, BY TESTATOR, within five years.

On the trial of the cause in the County Court, the plaintiffs gave in evidence an account of goods, &c. furnished the defendant's testator; and also an account against his son *John Fisher* for goods, &c. and for board and washing while he was under age and living with the plaintiffs in their store at the testator's request; also a letter from the testator stating his objections to those accounts, and submitting them to the adjustment of *Campbell* and *Wheeler* or their umpire; the deposition of *James Campbell* proving the settlement of the account after hearing both parties and examining a witness; the last item in which account is a credit for some tobacco, on the 9th of January: *Campbell* further said, that he did not recollect ever hearing that the testator objected to the settlement, but, on the contrary, he understood he was satisfied with it. The plaintiffs also proved that *John Fisher* was the testator's son, and whilst under age, lived in their store at his father's request.

the consideration of the jury; and, in this case, the county court having instructed the jury, that, "from the "whole testimony before them "the demand "of the plaintiffs was "not barred "by the act "of limitations," it was determined that the said opinion of the county court was erroneous.

After the above evidence was given by the plaintiffs, the defendant's counsel moved the court to instruct the jury that the testimony of *Campbell* did not support any one of the counts in the declaration; but the court instructed the jury that it did prove the *fifth* count: the defendant then moved the court to instruct the jury, that as the writ bore date the 10th of February 1799, and no assumption of the testator since the settlement had been proved, the plaintiffs were barred by the act of limitatations, but the court instructed them that *from the whole testimony* the plaintiffs were not barred. The defendant next moved the court to strike out of the account every item which bore date more than five years before the testator's death (which happened in December 1794, or January 1795) which the court refused to do. A separate exception was taken to each opinion of the court. The plaintiffs then further proved that after the death of the testator and the qualification of his executor their account was compared with the books of the testator, on which an account, *exactly corresponding with theirs*, was found: and this being all the evidence, the defendant's counsel moved the court to sign the bill of exception, which was done accordingly. There was a verdict and judgment for the plaintiffs, from which an appeal was taken to the District Court of *Peters-*

burg, where the same was reversed, and the cause retained for trial in that court.

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At the trial in the District Court, the plaintiffs after exhibiting their account against the defendant's testator, gave in evidence the testimony of *James Campbell*, who deposed, "that sometime in November 1793, at the desire of Col. *Daniel Fisher*, the defendant's testator signified in his letter of that date, and agreeable to the subsequent desire of the parties, to wit, the plaintiffs and the said *Daniel Fisher*, they afterwards met: *Luke Wheeler* and himself went into an examination and settlement of the account, debit and credit kept by the plaintiffs against *John Fisher* and brought into account against the said *Daniel Fisher;* that the said *Wheeler* and the deponent did then duly attend to the allegations and proofs of the parties; *Daniel Fisher*, and *Wm. Cole*, one of the plaintiffs, being both at times personally present; that he the deponent did sometime afterwards, in the course of that season, direct Mr. *Cole* to state the account, and that at that time and now he thinks the said account as directed to be stated, and the balance with interest thereon struck against the said *Fisher*, was due from the said *Fisher* to the said *Duncan* and *Turnbull;* and that he does not remember that the said *Daniel Fisher* in his lifetime ever objected to, or complained of his determination, but the contrary; that he recollects well, hearing that there were other matters of account between the parties; he believes they were agreed as to them; however they were not settled by him; that he adjusted the balance on the particular account between the parties, referred to him about December of the year 1793: that he further recollects giving his opinion, that the said *Daniel Fisher* had been allowed too small a credit for a particular quantity of tobacco, and that it appears the difference is placed to his credit in the account." The plaintiffs also gave in evidence a letter written by the defendant's testator in which he agreed to refer his dispute with the plaintiffs, to *Campbell* and *Wheeler*. They also offered in evidence the deposition of *John Gholson*, proving *repeated promises* of the defendant to discharge the account in question, and the evidence of *Walter M'Indoe*, that the said account was by him presented to the defendant, who compared it with the books of his testator and found it to correspond. To the testimony of *Gholson* as evidence in this cause, the defendants objected; but the court being divided in opinion, on the objection, it was permitted to go in evidence. The defendant's attorney

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then moved the court to cause to be expunged from the said account, every item thereof, which appeared to have been due five years before the death of the testator: on which motion the court were also divided in opinion, inasmuch as the account bore date before the Act of Assembly, directing such items to be stricken out—and the said motion failed. The jury rendered a verdict for the plaintiffs for £345 2 6, for which sum the court gave judgment, and the defendants appealed to this court.

G. K. Taylor, for the appellant. In the discussion of this question, it will be my duty to contend that the District Court did right in reversing the decision of the County Court, and then that it did as wrong in giving the judgment which it did. Every count in the declaration, is a general money count: but the *allegata*, and *probata* did not correspond. Now I hold it to be a first principle in pleading that if the plaintiff have a special case, he ought to declare on it, and not surprize the defendant at the trial by giving evidence of a *particular* transaction on a *general* count.(*a*) There is not a word in the declaration about an award, and yet the reference to *Campbell* and *Wheeler* and their award, were principally relied on at the trial. If it be the object of a declaration to apprize the defendant of the cause of action, is it possible that he could have had any idea of the case from the charge brought against him?

(*a*) 1 Esp. N. P. 139, 140.

The agreement being the gist of the action should always be declared on.(*b*) In our case there were only general money counts, and yet an arbitrament was relied on in evidence. That under such general counts you cannot give the special matter in evidence, has not only been decided in England, but by the courts of our own country. (*c*) So far the County Court acted erroneously in permitting evidence on the general counts.

(*b*) 1 Esp. N. P. 138.

(*c*) 1 Call, 239. *Wood* v. *Luttrell.* Judge PENDLETON'S opinion.—2 Wash. 172. *Overton* &c. v. *Hudson.*

In the next point the County Court also erred. Instead of instructing the jury specifically on the application of the act of limitations, they say, that, under *all the circumstances*, the act was no bar. Now it is well known that a court cannot instruct the jury on a matter of fact, or as to the weight of evidence.

Having demonstrated that the District Court did right in reversing the judgment of the County Court, I proceed to show that they did wrong in the opinion which they gave.

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Every charge in the declaration is against the defendant *on a promise of his testator;* and yet all the evidence goes to prove *a promise by the defendant himself.* All the books lay it down that the plaintiff must make out his title as laid in his declaration.(*d*) In a case in *Salkeld,* (*e*) where the executor brought a suit stating a promise to the testator, he was not permitted to give in evidence a subsequent promise to himself in order to take the case out of the statute of limitations. It appears equally strong and plain, that where an executor is sued, and the plaintiff charges a promise by the *testator*, he cannot give in evidence a promise by the *executor* himself. And that such evidence ought not to be admitted, will be more apparent, when it is considered that the defendant could, by no plea, put the fact in issue. He could not have pleaded that *he* did not assume; because he was not charged with an assumpsit. He was compelled to answer to the charge as laid in the declaration.(*f*) Now if the plaintiff, without suggesting a fact, may go into proof of it, and the defendant cannot put his defence in issue by any plea, then the plaintiff is in a better situation than the defendant.

(*d*) 1 Esp. 140.

(*e*) 1 Salk. 28 *Dean* v. *Crane*—reported more fully in 2 Ld. Raym. 1101, under the name of GREEN v. *Crane.*

(*f*) See 1 Esp. 146.

Again, it is an invariable rule of law that an executor, by his own promise, cannot bind the assets of his testator. If he gave his bond for a debt due from the testator, nobody would think of suing him *as executor.* For the same reason, *his promise* will not bind the estate of his testator, but his own estate only.(*g*) In the case of *Wheeler v. Collier* just cited it is expressly laid down, that the administratrix by her assumpsit, had made the debt, due from her intestate, her own, and that judgment should be of her own proper goods. In the other cases, I admit, that the general scope of the decisions has been overturned, because they go to say, that a *legacy* may be recovered *in a court of law.* But all those cases affirm, and there is not a *dictum* to the contrary, that an executor, by his assumpsit, cannot bind the estate of his testator. The District Court, therefore, erred in permitting evidence to go to the jury which could only have produced a judgment binding on the executor *individually*, when the charge as laid in the declaration, if supported, would only have bound the estate of the *testator.* The reason of the law, in declaring that the executor by his own promise cannot bind the estate of his testator, is obvious. If it were not so, a fraudulent executor by combining with creditors, or an improvident one, might ruin any estate. To guard against both those cases, the law has wisely

(*g*) Cro. Eliz. 91. *Trewinian* v. *Howell.*—*Ib.* 406. *Wheeler* v. *Collier.*—Cowp. 284, *Atkins* & wife, v. *Hill.*—*Ib.* 289, *Hawkes* and wife v. *Saunders.*

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provided that the promise of an executor shall only bind himself; and for *his* security, the undertaking must be in writing.

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On the next point—the court were moved to instruct the jury to expunge all the items of the account, which bore date over five years: the Judges were divided in opinion, because the case arose before the Act of Assembly passed, making this the duty of the court.(*h*) The true inquiry is, whether the Act affects the *rights* of the parties, or only gives a new remedy. For a century or more it has been the law of this country, that if a man did not bring such action within five years, he was barred. It is true that the defendant might not avail himself of the operation of the Act; but the plaintiff brought his action at his peril; *now* the law directs the *courts* to do, what was before the privilege of the defendant. How does this affect the *rights* of the plaintiff, when his remedy was gone before? This distinction brings the case within the reasoning of Judge ROANE in *Gaskins v. The Commonwealth.*(*i*) The uniform practice has been, where *rights* are not affected and only a new *remedy* given, to permit the law to operate upon the case.

(*h*) This Act passed in 1792. See Rev. Code, vol. 1, ch. 92, sect. 56, pa. 167.

(*i*) 1 Call, 196.

Hay, for the appellees, observed, that it always gave him serious concern to reflect upon the prospect of the first principles of moral obligation being sacrificed to the *forms* of law.

As to the judgments—that of the District Court was wrong, because it is believed that the promise of an *executor* to pay cannot be given in evidence to support a declaration charging a promise by the *testator;* but the judgment of the County Court was right. If proof of the promise of the executor had been given in evidence merely to show the *justice* of the debt, it would have been proper. In general the promise of an executor may be relied on as proof of the existence of the debt: but here, unfortunately it was introduced to take the case out of the statute of limitations.

But we are told that whenever the title of the plaintiff depends upon a special contract, he must state the contract in his declaration. Agreed: but, in this case there was no special contract. The testator of the appellant had an account with the appellees for a larger sum, and in that account there was *one* item for advances made to his son; he doubted whether he ought to pay that sum, but agreed that if *Campbell* and *Wheeler* should say it was

right, he would pay it; on their opinion, he entered the amount in his own books. As to his general account, he stood as any other person having dealings with his merchant, and there was no special contract in relation to his son. After this exposition of facts, where is the necessity of resorting to so much law-learning? Before the law was introduced with respect to special contracts it ought to have been shown that one existed in this case. There was no more special contract than there would be in a case where a man deals in a store, and differing with his merchant as to the price of a particular article, they agree to refer it to men. The *right* of the merchant does not arise from the reference, but from his customer's having purchased the article from him. So, in this case, the claim of *Ducan* and *Turnbull* did not arise from the reference to *Campbell* and *Wheeler*: their *right* existed before; and their claim is founded on the moral obligation of *Fisher* to provide for his son. The reference is merely *evidence* of the claim; *Fisher* having only *doubted* of his obligation to pay.

The County Court, says Mr. *Taylor*, did wrong in instructing the jury that the Act of Limitations was no bar. The defendant made a wrong motion, and the court in overruling it, went, perhaps too far. The court gave their opinion predicated on facts as stated by the parties: there was no assumption of facts on the part of the court. It seems rather unfair for the defendant to put the court in motion by making a wrong application, and then to object to their judgment because they had gone too far. The facts were, that the writ issued in 1799; the testator died in 1794 or 1795, and immediately before his death this item was entered on his books. Now the court, in saying, that from *the whole testimony* before them the Act of Limitations was no bar, only meant to speak in reference to the facts agreed by the parties. There were no facts to be disputed. The plaintiffs had stated facts in their declaration, and the defendant had agreed a case as stated in the bill of exceptions. The court never meant to decide facts; they only decided *on the facts* admitted by the defendant himself. They only say to the defendant, "assuming the facts as *you* admit them, *your* act of limitation is no bar."

On the motion to strike out of the account all items of more than five years standing, the court refused to accede; and they refused on a principle which has been fully

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sanctioned by this court in *Elliot's* executor *v. Lyell.*(j) *Now* the court is asked to apply this law to a case which existed before the law passed. In that case it was expressly decided that the law must act prospectively only. If the law affected the obligation of private contracts it would be unconstitutional: there is no legislative power to pass such a law. But admitting this dangerous doctrine, the present case is completely taken out of the operation of this law, by *Fisher's* acknowledging all the items of the account except so far as related to his son; on the same principle that the slightest acknowledgment will take a case out of the statute of limitations. A creditor is not bound to sue when his debtor will keep a debt alive by repeated promises to pay. It is unnecessary to answer many of the arguments of Mr. *Taylor*, because we differ so materially as to the facts.

(j) 3 Call, 268.

G. K. Taylor, in reply. The cause has been much narrowed by the course which Mr. *Hay* has thought proper to take. The question is not whether, in strict morality, the defendant ought to have pursued the course he did, but whether the *law* would bear out the plaintiffs and sustain their judgment.

It having been admitted that the District Court erred, it is only necessary to look into the conduct of the County Court. On that point I see no reason to vary the argument already made. But it is said, by Mr. *Hay* that there was no special agreement. Is there any question on this point? If there be many circumstances which may be inquired into under a general money count, and one only which requires a special count, will the court permit the plaintiff to go into evidence as to that circumstance unless he had introduced it by a special count? Certainly not. The only inquiry then is, whether this transaction relating to the item on account of *Fisher's* son, was a special agreement or not. Did *Fisher* acknowledge that he owed that sum? No. On the contrary, they referred it to *Campbell* and *Wheeler*. If this special circumstance had been stated, the executor might have shown that the award was not binding. This was not a general promise to pay. How does it appear, that this reference was only evidence of a preexisting debt? There is no evidence of the debt but what appears from the award of the arbitrators.

The entry on the books of the testator has no effect, because the court did instruct the jury that the evidence of *Campbell* supported the last count in the declaration, be-

fore any other evidence was introduced. This was a distinct point. The last exception taken, was as to proof of the entry on the books. Each exception was separate and distinct; and the question before this court is, not whether taking all the evidence together the County Court did right, but whether their decision was right on each distinct proposition. It *does appear* from the decision of the County Court, that under a charge for meat, drink, &c. furnished to the testator's son it would be proper to give evidence of an arbitrament!

But it was unfair, says Mr. *Hay*, to lead the court into an error, and then object because they had gone too far. Take the *facts* as stated by the counsel: and whether the court were deluded by the counsel in giving improper instructions or not, the effect would be the same. No assumpsit, by *Daniel Fisher*, within five years was proved. The writ was issued in February 1799; the settlement was made by *Campbell* in December 1793, or January 1794: more than five years and one month. The inquiry is not, whether the counsel led the court into an error, but whether the court did right on the facts submitted. When did the right to sue on the award commence?—the moment it was rendered. When was it rendered?—in December 1793, or January 1794. How then could the court say that the act of limitations did not run. Admitting the facts to have been improperly stated by counsel, how is the court warranted in saying, *from the facts* the statute of limitation was no bar. If they undertook to decide the facts, they encroached on the province of the jury.

As to striking out the items over five years standing, it will be recollected that I stated before, if it were to affect the *rights* of the parties, the law would not apply: but if the *remedy* only, it would: and I offered reasons why I did not think the act on that subject changed the preexisting law.

Judge TUCKER.—On the trial of this cause in the County Court of Prince George, the plaintiffs gave in evidence an account of goods, &c. furnished the testator, and also an account against his son *John* then under age, for goods, &c. and for board and washing while he was with them in their store, at the testator's request: as also a letter from the testator stating his objections to those accounts, and submitting himself to the arbitrament of *Campbell* and *Wheeler* or their umpire: the deposition of

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James Campbell proving the settlement and adjustment of the account, after hearing both parties, and making some necessary inquiries of a witness; the last article in this account is a credit for nine hogsheads of tobacco, dated January 9th 1794. *Campbell* further said, that he does not recollect ever hearing that the testator objected to, or complained of the determination, but, on the contrary, he understood he was satisfied and acquiesced in the settlement. They also proved that *John Fisher* was the testator's son, and whilst under age lived in the plaintiff's store, at the testator's request.

The declaration contained five counts—1st, For *indebitatus assumpsit* for goods sold.—2. *Quantum valebant* for the same.—3. For money lent, advanced, paid, laid out and expended for testator.—4. *Quantum meruit* for meat, drink, and clothes furnished his son.—5. *Insimul computassent* between plaintiffs and the testator. Plea *non assumpsit infra quinque annos.*

The plaintiffs having given the above evidence, the defendants moved the court to instruct the jury that the testimony of *James Campbell* did not prove any one of the counts in the declaration: but the court instructed the jury that it did prove and support the fifth count: the defendants then moved the court to instruct the jury that the writ bears date February 10th 1799, and that no assumption of the testator being proved after the settlement, the plaintiff is barred by the act of limitations; but the court instructed them that from the whole testimony the plaintiffs were not barred. The defendants then moved the court to strike every item out of the account which bore date more than five years before the testator's death, which was in December 1794 or January 1795, which the court refused to do. To each of their decisions an exception was taken—The plaintiffs *then further* proved that after the death of the testator, and the qualification of the defendants, as executors, they compared the books of their testator with the plaintiff's *account* and *found the account to correspond*, and this being all the evidence the defendants moved the court to sign the bill of exceptions (in which all the above matters are stated) which was done accordingly. There was a verdict and judgment for the plaintiffs—from which there was an appeal to the District Court of *Petersburg*, where the same was reversed, and the cause retained there for a new trial which was had, and a verdict and judgment there, also, for the plaintiffs, from which there is an appeal

to this court. I shall consider the exceptions taken in the County Court.

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1. The testimony of *James Campbell*, is objected to as not proving any of the five counts in the declaration. Now that testimony must be taken in conjunction with *Daniel Fisher's* letter, and the account exhibited and settled by himself and Mr. *Wheeler*, after an examination of the items both of debit and credit in the presence of the parties; and so taken, in my opinion was proper evidence to be admitted to prove every count in the declaration. For there is a wide distinction between a debt arising from an award; as where a man has an uncertain claim against another for damages in consequence of a tort—and a debt subsisting before the reference to arbitrators, but made certain and conclusive by their award, as in the present case; where the obligation of the father to pay for the board and clothing of his infant son, whom he had in a special manner procured the plaintiffs to receive into their store, upon the same terms as they had received the son of another friend, was to all intents and purposes as binding upon him before the reference, as after the settlement made by the referees. *Daniel Fisher's* own letter states *no other* objection to their accounts, which had been, as appears from that letter, in other respects settled. There was therefore no ground for the objection to *Campbell's* testimony, which was, I think, very properly admitted.

2. The second objection is, that the court instructed the jury that upon the whole testimony the account is not barred by the statute of limitations. If the bill of exceptions had stopped here, and it had not afterwards appeared that *other* evidence was offered to the jury, *viz.* that since the testator's death the executors had compared the account proved by *Campbell*, with their testator's books, and found it to correspond therewith, I should have thought this exception *fatal.* But we are not to garble a bill of exceptions, and to consider each point in it, as if the jury had been instantly sent from the bar, and had found a verdict accordingly—but we are to take the *whole matter* therein stated *together*, and taking this latter piece of testimony with the former; and considering that from the date of the last item in the account to the day of the emanation of the writ, was exactly one month only, over five years; and that the testator lived twelve months, or near it, after the date of that item, the jury might well presume that entry in the testator's own books to have been made within the five years, and were warranted also in presuming such an entry,

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as an assent to the justice of the account, and a direction to his executors to pay it. For jurors are not bound to draw strict conclusions only, from facts, but may and ought to draw such *legal* conclusions from them as may contribute to the advancement of justice. Taking then this last piece of testimony with what had preceded; and considering the jury as acting under the court's instruction upon the *whole evidence* TOGETHER, and not piece meal, I incline to think the objection, which would otherwise have been fatal, is cured.

3. The third exception to the court's opinion is, because they did not strike out every item in the account the date of which was five years previous to the testator's death, pursuant to the act of 1792, c. 92, 5, 56. But that clause relates to open accounts, only. It was a necessary and proper provision to guard against the numerous claims which have heretofore been brought against the estate of persons deceased, upon such accounts. But here was evidence of an actual settlement between the parties within *one* year before his death. I therefore think the court very properly rejected the motion. And upon the *whole*, that the judgment of the County Court was *substantially* right. Consequently that the District Court erred in reversing it—and for that cause the judgment of *reversal* ought itself to be reversed, and the judgment of the County Court affirmed—The last judgment of the District Court is unnecessary, under this view of the subject, to be discussed.

Judge ROANE. The issue joined in this cause being upon the plea of non assumpsit *by the testator* within five years, the admission of *Gholson's* testimony proving repeated promises *by the executor* in the years 1788 and 1789, in order to take the case out of the statute, was clearly erroneous. On this ground alone the judgment of the District Court must be reversed; and it is unnecessary to decide absolutely upon the other points made by the bill of exceptions in the District Court: I will, however, state my present impressions respecting them.

With respect to the letter of *Fisher* and the deposition of *Campbell*, I am not at present prepared to say that they were not admissible under the fifth count in the declaration; the *insimul computassent*. The cause of action arose, independently of the reference to *Campbell* and *Wheeler*, and that reference was only to adjust a disputed item. The parties accounted together, in relation

to that item, but in so doing they agreed to call in third persons to state the account between them. On the authority of a passage in *Buller* 129, I think it is not necessary that *both* the parties should *personally* account together in order to maintain this action: but the evidence in this case shows that both parties were, at times, present at the settlement, and that *Daniel Fisher* appeared satisfied therewith. There can be no pretence that the defendants could have been surprized with this evidence, because as well the account exhibited in the County Court as that exhibited in the District Court refer to the item in question as *having been settled by Campbell*; and it was also proved in the trial in the County Court that an account *exactly corresponding therewith* was stated on the books of the testator: the defendants were therefore sufficiently apprized that this testimony would be exhibited.

With respect to the last point made in the bill of exceptions, respecting the expunging of all items of more than five years' standing before the testator's death—I am not satisfied that the decision in the case of *Gaskins v. The Commonwealth*, (1 Call, 194,) would warrant its being done in the case before us. That limitation of time had run out, in relation to many of the items in the account *prior to the passage* of the act, and whereas, before the passage of the act, it depended on the will of the defendant to plead the statute, (a defence often not resorted to,) it became, after this act was passed, imperiously the duty of the court to expunge the items. This would *seem* to affect the existing rights of the plaintiffs, and, perhaps, bring this case within the reason of the decision in *Elliott's* executor *v. Lyell;* (3 Call, 268,) upon this point, however, I have formed no *conclusive* opinion.

The County Court also erred in their judgment.—In the trial there, the defendant moved the court to instruct the jury, that as the writ bore date *the 10th of February* 1799, and, as no assumption by *Daniel Fisher* was *proven* after the settlement by *Campbell*, (which was before the 1st of January 1794,) the demand was barred by the act of limitations; but the court instructed the jury on the contrary, that, from the whole testimony before them the demand was not barred.

There was no testimony before them which warranted such an opinion. The plaintiffs, it is true, proved that, after the testator's death, his books were compared with the account and found to correspond, and this is stated, (together with other evidence not pertinent to this point,) to be ALL THE TESTIMONY exhibited in the cause;—but

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this last testimony certainly does not prove an assumption by the testator *within five years* from the time of suing the writ, unless the plaintiffs had further proved that this entry *was made* within the limitation aforesaid. It may have been made, for anything that appears, more than five years before the suing of the writ; and, if the fact be otherwise, it is the fault of the plaintiff that he did not show it;—but, on the contrary, the court has admitted that no assumption was proven *after* the settlement by *Campbell*. It was proved in the trial before *the District Court* that the testator had *died more than five years* before the date of the writ, *viz.* in January 1794. It is true that, in the trial before the County Court, (whose judgment I am now examining,) it is stated in the bill of exceptions that this death was proved to have taken place in *December* 1794 *or January* 1795; but this may possibly be a mistake, and may have arisen from the probat of *Daniel Fisher's* will having been previously shown to have taken place at the lastmentioned period, *viz.* in *January* 1795. This is the only ground whereon to *reconcile* the conflicting opinions of the two courts as to the point in question. But be this matter as it may, if the entry in the testator's books is relied on to take the case out of the statute, that entry should have been shown to have been made, or *acknowledged*, within five years before the date of the writ.

It is said that the jury should have been permitted to infer an assumption within five years, from the mere existence of the entry in *Daniel Fisher's* books. While this position is not admitted, because the jury ought to have had some evidence of an assumption within five years, the County Court certainly erred in undertaking to say, and instruct the jury, that, from *this*, *or any other evidence* in the cause, the demand was not barred.

My opinion, therefore, is that both judgments be reversed.

Judge FLEMING. There can be no doubt, I think, that the District Court erred in permitting evidence to go to the jury to prove an assumpsit of the executor in an action founded on the assumpsit of his testator; the assumpsit of the former being no part of the issue between the parties. This seems sufficient error for reversing the judgment of the District Court.

With respect to the judgment of the County Court, it seems to me that the fifth count in the declaration is well

supported by the evidence, and, therefore, the objection of the defendant's counsel that the testimony did not maintain a single count is unfounded: nor did the court err in refusing to expunge every item in the account of more than five years' standing; because the testator, not long before his death, by his letter of the 16th of November 1793, acknowledged that he had settled his accounts with the plaintiffs, and complained of no article, except that he thought himself overcharged with the board and other expenses of his son *John Fisher*, who had lived in the store of the plaintiffs, which he submitted to the arbitrament of Messrs. *Campbell* and *Wheeler*, or their umpire. But it appears to me that the County Court erred in having instructed the jury that, "from the whole testimony before "them, the demand of the plaintiffs was not barred by "the Act of Limitations;" which I conceive to have been an improper interference, and an infringement on the privileges of the jury, whose right it was to judge of the sufficiency or insufficiency of the evidence adduced to establish any fact or facts in issue before them; the province of the court being to see that all *proper* evidence offered (and none other) be submitted to their consideration; without saying what effect such evidence ought to have in the cause.

The OPINION of the court is that the judgment of the District Court is erroneous in permitting the deposition of *John Gholson* to go as evidence to the jury, to prove an assumpsit of *John Fisher* one of the executors of *Daniel Fisher;* because an assumpsit of an executor cannot be given in evidence on the trial of an issue on the assumpsit of his testator within five years.

The judgment is therefore to be reversed and annulled, and this court proceeding to give such judgment as the said District Court ought to have given, a majority of the court is of opinion that the County Court erred in instructing the jury that, "from the whole testimony be-"fore them the demand of the appellees was not barred "by the Act of Limitations;" as the sufficiency of the evidence ought to have been left wholly to the consideration of the jury.

The judgment of the County Court is also to be reversed with costs, and the cause remanded to the said District Court for a new trial to be had therein, with directions that no instruction is to be given to the jury, on such trial, respecting the sufficiency or insufficiency of the evidence.

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WISE *against* CRAIG.

Bill for restitution of a sum of money paid for certificates, which the vendor had no right to sell: the defendant relied on the maxim, "*in pari delicto potior est conditio defendentis*:" the money was decreed to be refunded, there not being, as between the plaintiff and defendant *par delictum*.

The sole question raised in this case was, whether the conduct of the parties in the original transaction, which gave rise to the present suit, was such, as to bring them within the operation of the maxim, *in pari delicto potior est conditio defendentis*.

Adam Craig, claiming, as the adminintrator of *Francis Graves*, and as jointly interested with him in the original purchase, and as his assignee of the other moiety, the benefit of a contract entered into by the said *Graves* with a certain *John Wise* of Alexandria, filed his bill in the late High Court of Chancery, in which he stated that a certain *Windsor Brown* being entitled to a certificate from the commonwealth of *Virginia*, for £ 1260, with interest, on account of military services, died intestate and without issue; that *James Lawrason* took administration on his estate, sold the claim to *Wise*, and gave him a power of attorney dated the 12th of May 1791, authorizing him to receive *any debts, dues or demands of any nature due to the estate of Windsor Brown;* that *Wise* had previously purchased of *Robert Dougherty* the supposed heir at law of *Windsor Brown* all his right to this claim, and had received from him a power of attorney, dated the 27th of December 1790, authorizing him to receive it; that on the 16th day of May 1791 *Wise* sold the claim to *Craig* and *Graves* for £ 600, which sum was advanced by *Craig*, and paid to *Wise* by *Graves;* and by an indorsement on the power of attorney from *Dougherty*, *Wise* directed the certificates to be delivered to their agent; that this indorsement being without a date, the auditor (*John Pendleton*) refused to deliver the certificates, whereupon *Wise* on the 23d of May 1791, addressed a letter to him, which was duly authenticated, informing him that the indorsement had been made on the 16th; that *Wise* having refused or neglected to pay to *Lawrason* or *Dougherty* the consideration agreed to be given for the said claim, *Lawrason* on the 21st of May 1791, executed a second power of attorney to *Dougherty* authorizing him to draw the certificates for the whole amount of the claim, and *Dougherty* on the same day executed a similar power to *Robert Pollard*, in both of which all former powers of attorney were revoked; that *Pollard* on the 23d of May 1791, received certificates for the principal of *Windsor Brown's* claim amounting to £ 1260, and interest equal to £ 581 1 4: that *Graves* having instituted a suit in his

own name against *Wise* and *Jesse Sims*, whom he charged as being interested in the transaction, and being indebted to the complainant (*Craig*) in a much larger sum, transferred the whole claim to him; and shortly afterwards, dying intestate, the complainant took administration on his estate. It was further stated that *Wise* in the year 1792, went to Ireland, where he purchased from the remaining heirs of *Windsor Brown*, for a mere trifle, the whole of their claim to his estate, and actually obtained a decree against *Lawrason* his administrator, in September 1796, for $ 5387 57, besides interest, in consequence of which he was further bound to compensate the plaintiff for the money advanced, either in the certificates or their value, or by a return of the £ 600 with interest. The bill prays for a discovery and for general relief.

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The answer of *Wise* admits, in substance, the sale to *Graves* and the payment of the purchase money; but says that *Graves* was a great speculator and knew full well the amount to which *Windsor Brown* was intitled, of which he (*Wise*) was entirely ignorant; that before he sold to *Graves*, a certain *David Finley* in behalf of *James Dykes* offered him £ 650, for the powers of attorney of *Lawrason* and *Dougherty*, if he would guaranty their sufficiency, but he refused; and *Dykes* was allowed time to ascertain their sufficiency; that *Graves* was perfectly satisfied with the powers of attorney, "expressed great anxiety to get the better of *Dykes* in the bargain, that he might disappoint the young speculators," and that he told him "he knew "not whether the powers were good or bad, that he sold "them just as they were; if they were good, *Graves* "would be benefitted by them: if they were bad, he must "lose what he had paid for them, and that *Graves* agreed "to purchase them in that way; and the bargain was con- "cluded upon those terms;" that the form of the indorsements was prescribed by *Graves* himself; and on one of the powers of attorney a blank was left to insert the name of some person other than *Graves*, as he could not appear in Richmond; that if *Graves* had applied in time he might have drawn the certificates, but having neglected to do so, *Lawrason* and *Dougherty* sold the claim to *Dykes* and *Finley*, the agents of *Pollard*, and executed a power of attorney to the latter; that when he obtained the power of attorney from *Lawrason* on the 12th of May 1791, he had purchased of *Dougherty* his whole claim to *Windsor Brown's* estate; and that although he went to Europe in

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1792, and obtained a power of attorney from the remaining heirs of *Windsor Brown*, it was merely to authorize him to recover the estate to which they were entitled, but that he did not purchase any interest in it.

The answer of *Jesse Simms* declares that he was a disinterested negotiator between *Wise* and *Graves*, and no ways interested in the transaction; that *Dykes* and *Graves* both came to Alexandria to purchase the claim, well knowing its amount and value; that *Dykes* offered £650 for it, if *Wise* would guaranty the powers to be sufficient; but *Wise* refused, and it was finally agreed that *Dykes* should have time to send to Richmond, in order to ascertain whether the powers were sufficient or not. *Graves* finding that the bargain was progressed so far, procured from *Simms* who was the bar-keeper of *Wise* and who transacted most of his business, a sight of the powers of attorney: he declared them sufficient, and gave £600 for them "taking them upon his own responsibility, it being "distinctly understood that *Wise* was not to refund the "purchase money in case the powers proved insufficient; "that *Graves* bought the said powers for better for worse, "taking upon himself the risk of their sufficiency, and "exempting *Wise* from all liability in case they did not "prove sufficient."

The deposition of *Jesse Simms* was also taken at the instance of *Wise*, saving all just exceptions, &c. It further proved that *Graves*, during the treaty, declared, "if *Wise* "would not take the £600, he would go and offer that "sum to the administrator of *Windsor Brown*, and get "another power of attorney revoking his."

It was proven by the deposition of *Lawrason*, that in the year 1791, *Wise* informed him that he had been to Richmond and discovered a debt of about 40 or £50 due to *Windsor Brown* from a gentleman in that place, and intending to return in a few days, if he would give him a power of attorney he would collect it; that he gave *Wise* a short power of attorney to enable him to collect the money from the supposed debtor. The power of attorney (which is set out) authorizes *Wise* to "receive any debt "or debts, dues or demands of any nature or kind soever, "which may be due to the estate of *Windsor Brown*;" that at the time of making the power of attorney he did not know that his intestate was entitled to one shilling from the publick; and nothing on that subject ever passed between him and *Wise*, who had no right to transfer that

instrument to any person; and the first intimation he had of *Wise's* having purchased the claim of *Dougherty* was when *Graves* and *Dykes* came to Alexandria for the purpose of buying it, when a certain *David Finley* informed him that *Dougherty* had sold his claim to *Wise* for one hundred pounds, for which he had offered £650: finding that *Wise* had taken a most "*flagrant advantage*" of *Dougherty* who was an ignorant man, fond of liquor, and easily imposed upon, he permitted him to sell it again. He accordingly executed a power of attorney to *Dougherty* who executed one to *Dykes* and *Finley;* that he knew nothing of the negotiation between *Graves* and *Wise* or he would have interfered immediately and put a stop to it by asserting his right. He confirmed the charge in the bill that *Wise* went to Europe in the year 1792, and procured powers of attorney from the remaining heirs of *Windsor Brown*, in virtue of which he had instituted a suit against him and obtained a decree for $5387 55, besides interest.

Several other witnesses proved the transaction to have been apparently fair on the part of *Graves;* who seemed to be highly pleased with his bargain, and that he had given what was then deemed the market price of the certificates. No evidence was adduced of *Wise's* having paid any consideration to *Lawrason*, whose deposition as to the mode in which *Wise* acquired the power of attorney from him remained unimpeached; but it was proved that *Wise* introduced to *Dougherty* the subject of his claim on *Windsor Brown's*, by asking him "what he thought of "taking £100 for a thing which he never heard tell of, "and which he never might," and purchased it for £100, to be paid when the claim should be collected. It also appeared, in evidence, that although *Wise* had obtained a decree against *Lawrason* for the sum mentioned in the bill and in his deposition, yet that he acted merely under the powers of attorney from the heirs of *Windsor Brown* in Ireland, and had paid over to them all the monies collected from *Lawrason* by virtue of the decree.

On a hearing, in June 1802, the Chancellor dismissed the bill as to *Jesse Simms*, and decreed "that *Wise* should "pay the complainant £600 received from him by *Wise* "for what he had not power to *dispone*, and what the "buyer did not obtain, with interest, &c." From which decree an appeal was taken to this court.

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Hay, for the appellant, relied in argument, wholly upon the position, that a court of equity will not decree the restitution of money paid on a contract, where the parties to that contract are in *pari delicto*. Where men have been relieved from the effects of illegal or fraudulent contracts, it has been on the ground that the party seeking relief was not *equally guilty;* as in the case of a recovery for money paid under a usurious contract, or to the creditor of a bankrupt to induce him to sign a certificate; in both which cases the pressure of the borrower's or bankrupt's situation excepted them from the operation of the rule.

(a) Ante 33. In the important case of *Austin v. Winston*,(a) though there was some division in the opinion of the court, yet all agreed there had been a fraudulent combination in both. The Judge who did not carry his opinion as far as some of the others, laid down the following rule: "The doc- "trine I subscribe to is this, that in cases of *equal frauds* "committed against third persons, (I mean where the "parties thereto are *equally* guilty,) although such frauds "operate no injury to the rights of such third persons, and "create no *rights* in favour of the parties thereto, yet in "that case *possession* stands for the right; and that one "volunteer in such fraud, may, as against his *equally* "*guilty companion*, retain any advantage he has gained."(b)

(b) See in Judge ROANE's opinion p. 42. There is nothing in *Graves's* situation to exclude him from the benefit of the general rule.—In 1791, *Wise*, who had previously for a mere trifle, purchased of *Dougherty*, the supposed heir of *Windsor Brown*, all his claim to the estate of his ancestor, fraudulently obtained from *Lawrason* the administrator of *Windsor Brown*, a general power of attorney, under the pretext of collecting some money which he said was due to the estate of *Windsor Brown* from a gentleman in Richmond. *Lawrason* was totally ignorant of the claim against the commonwealth for the military services of his intestate; and nothing passed between him and *Wise* on the subject. If it was fraudulent, immoral, and unjust in *Wise* to attempt to sell those certificates in which he had no right or interest, and for receiving which he had no power; it was equally so in *Graves* to endeavour to get possession of them, with a full knowledge that *Wise* had no power to dispose of them. All the papers were submitted to *Graves:* the power of attorney from *Lawrason*, upon the face of it, shows that *Wise* had no power to draw or to sell *certificates;* and there is full evidence that *Graves* knew it: for, during the treaty, he endeavoured to intimidate *Wise* into a sale by telling him,

that if he would not accede to his offer of £600, he would go and offer that sum to *Lawrason*, who was then living in Alexandria, and get another power of attorney revoking his. He entered into a negotiation with *Wise* for the purpose of obtaining those certificates, paid him £600, knowing that he had no right to sell, and carefully concealed the transaction from *Dougherty* and *Lawrason* who were both on the spot; but who, getting notice of it, defeated his projects by selling to others. On what principles of law or equity can he ask, from a court, restitution of his money? *Wise* had been offered £650 for the same papers, by other speculators. They both knew that if application were made to *Lawrason* for more specifick powers, the whole business would have exploded, and they would have been defeated in their views. They therefore, both concluded that it was best to close the contract.

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Call and *Randolph*, for the appellee, contended that the principle on which Mr. *Hay* solely rested his argument, had no application to the present case. *Wise* had purchased of *Dougherty* the only heir at law of *Windsor Brown* known in this country, his claim to the estate of his ancestor, for a less sum than it was worth; and concealing his views from *Lawrason*, he fraudulently obtained from him a power of attorney sufficiently extensive in its operation to authorize the drawing of this claim; for it appears that the only objection of the auditor was, that the indorsement was without a date. This was a fraudulent transaction of *Wise* alone, not a combination to injure a third person; and there is no proof that *Graves* knew that *Wise* had practised a fraud on *Dougherty*.

An attempt has been made to *infer* a fraud in *Graves*, because from the face of the papers it is presumed he must have known that *Wise* had no right to sell the claim. This is reversing the rule. Fraud must always be proved and can never be presumed.

The intimidation held out by *Graves* to *Wise*, that if he did not let him have the papers, he would go to *Lawrason* and get new powers revoking his, was merely the language of a negotiator; he was endeavouring to make the best bargain he could. But admitting that *Graves* had got another power of attorney from *Lawrason*,—although it might have availed him at law, yet it would not in equity: for knowing the right of *Wise*, he would have been a mere trustee for his use, and a court of equity

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as an assent to the justice of the account, and a direction to his executors to pay it. For jurors are not bound to draw strict conclusions only, from facts, but may and ought to draw such *legal* conclusions from them as may contribute to the advancement of justice. Taking then this last piece of testimony with what had preceded; and considering the jury as acting under the court's instruction upon the *whole evidence* TOGETHER, and not piece meal, I incline to think the objection, which would otherwise have been fatal, is cured.

3. The third exception to the court's opinion is, because they did not strike out every item in the account the date of which was five years previous to the testator's death, pursuant to the act of 1792, c. 92, 5, 56. But that clause relates to open accounts, only. It was a necessary and proper provision to guard against the numerous claims which have heretofore been brought against the estate of persons deceased, upon such accounts. But here was evidence of an actual settlement between the parties within *one* year before his death. I therefore think the court very properly rejected the motion. And upon the *whole*, that the judgment of the County Court was *substantially* right. Consequently that the District Court erred in reversing it—and for that cause the judgment of *reversal* ought itself to be reversed, and the judgment of the County Court affirmed—The last judgment of the District Court is unnecessary, under this view of the subject, to be discussed.

Judge ROANE. The issue joined in this cause being upon the plea of non assumpsit *by the testator* within five years, the admission of *Gholson's* testimony proving repeated promises *by the executor* in the years 1788 and 1789, in order to take the case out of the statute, was clearly erroneous. On this ground alone the judgment of the District Court must be reversed; and it is unnecessary to decide absolutely upon the other points made by the bill of exceptions in the District Court: I will, however, state my present impressions respecting them.

With respect to the letter of *Fisher* and the deposition of *Campbell*, I am not at present prepared to say that they were not admissible under the fifth count in the declaration; the *insimul computassent*. The cause of action arose, independently of the reference to *Campbell* and *Wheeler*, and that reference was only to adjust a disputed item. The parties accounted together, in relation

to that item, but in so doing they agreed to call in third persons to state the account between them. On the authority of a passage in *Buller* 129, I think it is not necessary that *both* the parties should *personally* account together in order to maintain this action: but the evidence in this case shows that both parties were, at times, present at the settlement, and that *Daniel Fisher* appeared satisfied therewith. There can be no pretence that the defendants could have been surprized with this evidence, because as well the account exhibited in the County Court as that exhibited in the District Court refer to the item in question as *having been settled by Campbell*; and it was also proved in the trial in the County Court that an account *exactly corresponding therewith* was stated on the books of the testator: the defendants were therefore sufficiently apprized that this testimony would be exhibited.

With respect to the last point made in the bill of exceptions, respecting the expunging of all items of more than five years' standing before the testator's death—I am not satisfied that the decision in the case of *Gaskins v. The Commonwealth*, (1 Call, 194,) would warrant its being done in the case before us. That limitation of time had run out, in relation to many of the items in the account *prior to the passage* of the act, and whereas, before the passage of the act, it depended on the will of the defendant to plead the statute, (a defence often not resorted to,) it became, after this act was passed, imperiously the duty of the court to expunge the items. This would *seem* to affect the existing rights of the plaintiffs, and, perhaps, bring this case within the reason of the decision in *Elliott's* executor *v. Lyell;* (3 Call, 268,) upon this point, however, I have formed no *conclusive* opinion.

The County Court also erred in their judgment.—In the trial there, the defendant moved the court to instruct the jury, that as the writ bore date *the 10th of February* 1799, and, as no assumption by *Daniel Fisher* was *proven* after the settlement by *Campbell*, (which was before the 1st of January 1794,) the demand was barred by the act of limitations; but the court instructed the jury on the contrary, that, from the whole testimony before them the demand was not barred.

There was no testimony before them which warranted such an opinion. The plaintiffs, it is true, proved that, after the testator's death, his books were compared with the account and found to correspond, and this is stated, (together with other evidence not pertinent to this point,) to be ALL THE TESTIMONY exhibited in the cause;—but

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this last testimony certainly does not prove an assumption by the testator *within five years* from the time of suing the writ, unless the plaintiffs had further proved that this entry *was made* within the limitation aforesaid. It may have been made, for anything that appears, more than five years before the suing of the writ; and, if the fact be otherwise, it is the fault of the plaintiff that he did not show it;—but, on the contrary, the court has admitted that no assumption was proven *after* the settlement by *Campbell*. It was proved in the trial before *the District Court* that the testator had *died more than five years* before the date of the writ, *viz.* in January 1794. It is true that, in the trial before the County Court, (whose judgment I am now examining,) it is stated in the bill of exceptions that this death was proved to have taken place in *December* 1794 *or January* 1795; but this may possibly be a mistake, and may have arisen from the probat of *Daniel Fisher's* will having been previously shown to have taken place at the lastmentioned period, *viz.* in *January* 1795. This is the only ground whereon to *reconcile* the conflicting opinions of the two courts as to the point in question. But be this matter as it may, if the entry in the testator's books is relied on to take the case out of the statute, that entry should have been shown to have been made, or *acknowledged*, within five years before the date of the writ.

It is said that the jury should have been permitted to infer an assumption within five years, from the mere existence of the entry in *Daniel Fisher's* books. While this position is not admitted, because the jury ought to have had some evidence of an assumption within five years, the County Court certainly erred in undertaking to say, and instruct the jury, that, from *this, or any other evidence* in the cause, the demand was not barred.

My opinion, therefore, is that both judgments be reversed.

Judge FLEMING. There can be no doubt, I think, that the District Court erred in permitting evidence to go to the jury to prove an assumpsit of the executor in an action founded on the assumpsit of his testator; the assumpsit of the former being no part of the issue between the parties. This seems sufficient error for reversing the judgment of the District Court.

With respect to the judgment of the County Court, it seems to me that the fifth count in the declaration is well

supported by the evidence, and, therefore, the objection of the defendant's counsel that the testimony did not maintain a single count is unfounded: nor did the court err in refusing to expunge every item in the account of more than five years' standing; because the testator, not long before his death, by his letter of the 16th of November 1793, acknowledged that he had settled his accounts with the plaintiffs, and complained of no article, except that he thought himself overcharged with the board and other expenses of his son *John Fisher*, who had lived in the store of the plaintiffs, which he submitted to the arbitrament of Messrs. *Campbell* and *Wheeler*, or their umpire. But it appears to me that the County Court erred in having instructed the jury that, "from the whole testimony before "them, the demand of the plaintiffs was not barred by "the Act of Limitations;" which I conceive to have been an improper interference, and an infringement on the privileges of the jury, whose right it was to judge of the sufficiency or insufficiency of the evidence adduced to establish any fact or facts in issue before them; the province of the court being to see that all *proper* evidence offered (and none other) be submitted to their consideration; without saying what effect such evidence ought to have in the cause.

The OPINION of the court is that the judgment of the District Court is erroneous in permitting the deposition of *John Gholson* to go as evidence to the jury, to prove an assumpsit of *John Fisher* one of the executors of *Daniel Fisher;* because an assumpsit of an executor cannot be given in evidence on the trial of an issue on the assumpsit of his testator within five years.

The judgment is therefore to be reversed and annulled, and this court proceeding to give such judgment as the said District Court ought to have given, a majority of the court is of opinion that the County Court erred in instructing the jury that, "from the whole testimony be-"fore them the demand of the appellees was not barred "by the Act of Limitations;" as the sufficiency of the evidence ought to have been left wholly to the consideration of the jury.

The judgment of the County Court is also to be reversed with costs, and the cause remanded to the said District Court for a new trial to be had therein, with directions that no instruction is to be given to the jury, on such trial, respecting the sufficiency or insufficiency of the evidence.

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MEREDITH *against* BENNING.

In September 1802, the Chancellor directed an account to be taken by a commissioner of the court, and a report made of what was due from *Peter May* to *John Johns*, and of the payments in discharge thereof by his securities respectively. The commissioner reported the balance due on the several judgments of *Johns* against *Peter May* and his securities to be £602 4 7, including interest; and from an examination of the account accompanying the award of the arbitrators in the last mentioned suit, and a comparison of dates, he inferred that although the arbitrators in their statement had taken into view the transactions of *William May*, the assistant of *Peter*, yet that from the late period at which he qualified the first judgment obtained by *Johns* against *Peter May* and his securities must be considered the just sum for which they were responsible, at that time, and totally unconnected with the transactions of *William May*.

In September 1802, the Chancellor dismissed the complainant's bill, from which an appeal was taken to this court.

Stuart, for the appellant. The following points will be relied on: 1st, It will be contended that the cause of action, as laid in the declaration, if supported by evidence, is not sufficient either in a court of law or equity to justify the verdict and judgment rendered at law. The cause of action, it will be recollected, was, that *Meredith* had assisted *May* in the removal of his property to North Carolina. If this point should be decided against us, we will 2ndly show indisputably that the property carried to North Carolina, did not belong to *May* but to *Meredith;* and 3dly, that the money paid by *Benning* was in his own wrong, as at the time of the payment *May* was not a defaulter for a single farthing. If all these points should be decided against us, we shall rely that *Meredith* should only be made liable for his proportional part, as a co-security; instead of which he has been made liable for the whole. His taking his slaves to North Carolina was only to avoid paying the whole debt;—he was always willing to have paid his part.

As to the 1st point. It is contended that there is nothing in the evidence which shows any impropriety in the conduct of *Meredith* and *May*, in carrying the property to North Carolina. It appears from the plaintiff's own showing in the declaration, that before there was

any judgment or motion in behalf of the high sheriff, *Meredith* assisted *May* in the removal of the property. Has not a person, before any restraining process has been issued against him, a right to remove his property from one place to another? Had there been an execution, or writ of *ne exeat*, it is admitted that it would have been a violation of the law. Is that old opinion to be revived, that a person assisting another to remove out of the State is liable for his debts? But, if there was a right of action, it was not in *Benning:* he was a co-security, standing in the same situation as *Meredith*, and had not been made liable to pay a single farthing. But if the court should think this point against us, we shall 2dly establish, that the property which was complained of as being removed, was, in fact, the property of *Meredith*, and that he had a right to remove it wherever he pleased. From the bill it appears, that in the year 1783, before *May* became a deputy sheriff, or was incumbered at all, he made a purchase of *Meredith* of a tract of land to the amount of £500. This fact is proved by three witnesses: it is also proved by two other witnesses that other parts of the account of *Meredith* against *May*, stated in the record, were for money advanced and upon valuable consideration. After these transactions, and before the issuing of any execution there was a settlement of accounts between *May* and his father-in-law *Meredith*, and a bill of sale executed by the former to the latter for the slaves which *May* had received as a marriage portion with the daughter of *Meredith*. There is no evidence to oppose the fairness of this transaction. It further appears that there was a considerable balance still due from *May* to *Meredith*. If this property were his own, he cannot be placed in a worse situation than if it had remained in this State. Will the removal of his own property compel him to pay more than his just proportion as a co-security?

I come now to the 3d point, on which I principally rely; and will show the propriety of the interference of a court of equity. There was a suit commenced in the District Court of Prince Edward by *Johns* against *Peter May* and his securities, for defalcations by *May*, while he acted as the deputy of *Johns*. The matters in controversy, were referred to arbitrators, who found it difficult to separate the particular causes of action in this suit, from those which produced the judgments in the court of Buckingham, obtained, by motion in behalf of *Johns* against his deputy *May* and his securities. They, therefore,

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took a view of the whole transactions of *Peter May* from the commencement of his sheriffalty to its close: the result of which was that *Peter May* was a delinquent for £ 103 0 9 only; and *William May*, as sub-deputy, was delinquent upwards of £ 500. *William May* was as much the deputy of the high sheriff as *Peter*, but his transactions were confined to the district of *Peter May* alone, by his consent and that of the high sheriff. The record shows that *William May* qualified as a deputy at the instance of the high sheriff; and moreover that *Peter May* gave bond, with new security, for the faithful performance of the duties of his office. We contend, therefore, that for the transactions of *William May*, the first securities of *Peter* are not liable. Not a cent of the money paid by *Benning* was on account of the defalcation of *Peter May*, but of *William* only: for the securities of *Peter* had already paid more than he was in default. If the high sheriff admits an additional deputy to act, and takes security for his conduct, he takes the responsibility on himself, and discharges the securities of his first deputy. This is a thing of personal trust and confidence, and the securities enter, purely on the ground of a knowledge of the deputy. Would it not be unreasonable, when the securities of *Peter May* had confidence in him alone, to permit the high sheriff to introduce *William May* in whom they might have no confidence, and charge them with his transactions? But why did the high sheriff ask for further security, if he thought the former securities of *Peter May* were bound?

If the report of the referees be correct, we are clearly exonerated. *Johns* refers to this very report and makes it a part of his answer; *Benning* also refers to *John's* answer and makes it a part of his. But it will be argued that this case is forever closed by the judgments at law. Can this be true when the parties themselves refer to the report of the referees. They, therefore, completely open the case to the interference of a court of equity. Suppose there had been as many verdicts in an action of debt upon a bond as the law would allow, would not a court of equity interfere, if it appeared that the money was not due? So in this case, we have been sued for removing property which was our own, and judgment has been obtained for a sum much larger than we were on any principle bound to pay.

But how can it be accounted for, that the verdict was for the whole debt, against one security who was only bound with others? Is there any principle of law or equity

which will justify this verdict? If the court should think that we are bound at all, it can only be for our proportional part. No damages can be demanded by *Benning* for any sacrifices which he may have made in raising money to pay the debt for which he was bound as the security of *Peter May*. The case of *Halcomb v. Flournoy* (*a*) settles that question. The most that can be said is, that *Meredith* is bound for one third of £318 18, which appears to be the whole sum paid by *Benning*.

(*a*) 2 Call, 433.

It will appear at the first view that the object of *Meredith* in removing his property was not to avoid the payment of his just proportion. Before he removed any of his property, he sent to *Johns* and offered to pay his full proportion, if he would exonerate him from the residue. The only deposition which goes to call in question the integrity of *Meredith*, is that of *William May;* but two other witnesses prove the disposition of *William May* towards *Meredith;* and there are circumstances which show that no attention should be paid to it. He says that the negroes of his father *Charles May* were brought to the house of *Meredith*, and that he was very active in conveying them out of the state. Now, is it probable that *Meredith* who was apprehensive that he should have the whole debt to pay, would be assisting in carrying the slaves of one of his co-securities out of the state? But there is other evidence which shows, that it was with great reluctance *Meredith* could be prevailed on to take any of his property out of the state. He was placed in this situation: one of his co-securities, *Charles May*, was carrying his property out of the state; *Benning*, the other security, was the relation of *Johns*, who refusing any terms of accommodation, he was still more apprehensive that he should have the whole debt to pay. But after his return, and when his property was out of the reach of the law, he still made a proposition to *Johns* to pay his full proportion. Under these peculiar circumstances his character cannot be impeached for wishing to avoid the payment of more than his just proportion.

Upon the whole view of the case *Meredith* has been an injured and an oppressed man. There has been a verdict against him for £500, when not more than 106 were due.

Wickham, for the appellee. Mr. *Stuart* has certainly done justice to the cause of his client, so far as it respects the points which he has thought proper to submit to the consideration of the court: but the counsel on the other

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side *must know* that if they expect to gain the cause, it must be on points which have not yet been made. Admitting every position to be correct as stated by Mr. *Stuart;* the question still occurs, *how is this court to say that the Chancellor did wrong in dismissing the appellant's bill?* This was a plain action *at law;* the foundation of which was the appellant's assisting a publick defaulter in removing his property out of the state, and thereby subjecting the appellee who was his security to the payment of a considerable sum of money. Mr. *Stuart* supposes that this action is not maintainable. But if this objection lay, if the action cannot be sustained, is a *court of equity* to sit to correct the errors of a *court of law?* If the action were not sustainable, why did not the defendant move an arrest of judgment, or sue out a writ of error? The District Court did think the action maintainable: for they rendered judgment on the verdict of the jury. The Judges were applied to for a new trial; they had the case a day under consideration, and rejected the application.

This cause has been taken up as if it were of the first impression, and has been argued as if it were now before a jury. The attention of *this court* sitting on an appeal from a decree of the Chancellor, has been drawn to points which were or *might have been* submitted to the District Court, of common law jurisdiction. After all those things had appeared before the court of law, the defendant filed his bill in equity, and insisted that the plaintiff at law was bound to answer. What did the Chancellor do? He granted a *new trial.* It was an action of *tort*, not a case of mere equitable jurisdiction. If the Court of Chancery could, with propriety, interpose, it did all that could be done, which was to grant a *new trial:* and what could this court do were it to interpose?—surely it could only grant a *new trial!*—The Chancellor *did grant* a new trial, though there was nothing in the record to warrant it; the parties were again fully heard, and there was another verdict for the appellee.

This has been likened to the case of *Halcomb v. Flournoy;* but it is totally dissimilar in every feature. I hold it to be clear law, that if A. be indebted to B., let B. be put to ever so much trouble in getting his money, the *principal and interest* is the only measure of damages, because it *sounds in contract;* but if A. be indebted to B., and C. a third person interfere in transferring the property of A. out of the reach of the law, it is a question for

the consideration of a jury what damages they will give for the real injury sustained.

It is said that *Benning* had no cause of action, because he had not, in fact, paid the money. This is a question which it is unnecessary to inquire into, in a court of equity. *Benning* had been indulged by the general assembly; and probably gave new security; the debt was, therefore his own. It is no ground for the consideration of a *court of equity*, that the party had no cause of action when he commenced his suit, if, at the time of the judgment, he had a right. A court of law might be bound to turn the parties round, but not a court of equity.

But we are asked,—can a man be prosecuted for carrying his own property out of the state?—I answer, *No;* if there be no fraud: but if it be for a fraudulent purpose he may be prosecuted. Whether the property of *Peter May* was fairly acquired by *Meredith* was a question proper to be submitted to a jury. We must presume that there was evidence before the jury to satisfy them, that the transaction was not a fair one. The jury did not decide on *affidavits*, as a court of equity must do, but determined after hearing the *viva voce* testimony, and weighing the credibility of the witnesses. There was no motion to the District Court to certify that the verdict was against the weight of evidence, and this verdict weighs against all the testimony which can be adduced. The Chancellor, notwithstanding those verdicts, referred the accounts to a commissioner, who made a report; and reported correctly if it were a mere matter of account, if no damages were to be given for the intromission of a third person to defraud a just creditor.

The transaction between *Peter May* and *Meredith* was fraudulent upon the face of it. After *Peter May* had become a defaulter as a deputy sheriff, then the debt for the land was for the first time thought of. There was no deed, no mortgage, no bond; nothing to show the transaction. And after *Peter May* was indebted largely for the land, *Meredith* still gives him eight negroes. Is this presumable? He trusts this man, without a scrip on paper, for a large tract of land, and then gives him so many negroes, without any security for either. This case is clearly against *Meredith* if it be necessary to look into it; but it has been forever closed by the verdict of the jury.

But we are told there was a reference of a subsequent suit brought by *Johns* against *Peter May* and his securities, and it appears that *Benning* has recovered of *Mere-*

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dith more than *Johns* was entitled to. Did that affect *Benning?* Did it prevent him from bearing the whole burthen of the debt? Counsel have considered *Meredith* simply as a co-security. This is not correct. The jury considered him as a man fraudulently assisting another to evade the law. *Johns* bringing his action against *Peter May* and others his securities, it was the duty of *May* to have defended the suit and to have shown what was really due. Can *Peter May* now come forward and say too much was recovered by *Johns*? Under the circumstances of this case, any man assisting *May* to secrete his property was unquestionably liable to *Meredith* for damages. Whether anything was due to *Johns* or not, was of no importance.

The permission of *Johns* to introduce *William May* as the assistant of *Peter*, cannot vary the responsibility of the latter; for he would have been liable for the taxes within his district whether he had collected them or not. But it is altogether a mistake in point of fact, that *Peter May* and his securities were made liable for the conduct of *William*. The judgment which *Benning* had to pay, was for the taxes of 1784 collected by *Peter May* exclusively, before *William* was admitted his security, who did not qualify till 1785. The award of the arbitrators made in the subsequent suit of *Johns* against *Peter May* and his securities, embraced the taxes of 1785, and other defalcations of *Peter May*. The referees state, that after *Benning* had paid all the judgment first mentioned, he owed *Johns* on account of the other deficiences of *Peter May*, the sum of £103, being his proportional part.

But, says Mr. *Stuart*, there is no principle of law or equity which could make *Meredith* liable for more than his proportion, as a co-security. It is admitted by us, that he was not *more liable* for being security; but he was liable for the fraud. This was collateral to his securityship. Surely they must admit that he is not the *less liable* on that account.

As to the character of *Meredith*, I am willing to admit that, in private life, he is a respectable man; but there is such a thing as fraud in a technical sense. It is not so clear, however, that *Meredith* acted correctly. *Peter May* was an insolvent debtor; *Meredith* takes his property and that of *Charles May* and conveys it off. What is the consequence? *Benning* was compelled to pay the whole debt, instead of his just proportion. But *Meredith* offered to pay his proportion to *Johns!*—Was *Johns* bound to re-

ceive it? No. Because *Meredith* was *liable* for the whole. How often does it happen that a security would be very glad to get off by paying his proportion of a debt! But by what rule of morality did *Meredith* suffer *Benning* to be *ruined?* He might have deposited his third part for his use, if *Johns* had refused to receive it. But, in truth, there is nothing in the record which warranted the interposition of a Court of Chancery in the first instance.

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Hay and *Randolph*, in reply, argued on the supposition that the jury in awarding damages to *Benning* in his action against *Meredith*, had considered it a mere matter of *account*, and not a question of fraud, on an action sounding in *damages*. They undertook to show that *Benning* had recovered of *Meredith* a much larger sum than was due from *Peter May*, to *Johns;* and inferred from thence, that if this fact had been known to the jury, they never would have given such excessive damages against *Meredith*. They also contended that *Meredith* was entitled to the interposition of a court of equity, because his counsel confident in the success of his cause, from the weakness of the testimony brought forward against him, had failed to exhibit evidence in their power, showing that the slaves carried to North Carolina were, in truth, his own property; that the balance due from *Peter May* to *Johns* arose from the defalcations of *William May* who was admitted a sub-deputy of *Peter's* by *Johns*, and for whose conduct the first securities of *Peter* were not responsible: and that the award of the arbitrators in the suit of *Johns* against *Peter May* and his securities proved clearly, that there was not so much due from *May* to *Johns*, as had been recovered by *Benning* of *Meredith*.

Judge TUCKER.—This was an action for a tort, brought by the appellee *Benning* against the appellant, in which the former obtained a verdict against him for £500, for secretly and *maliciously* taking and carrying away the slaves and other property of one *Peter May* (against whom he had lawful cause of action) to parts unknown, and for still keeping, secreting, and concealing them, and also for aiding, assisting, and counselling the said *Peter May* in removing *himself to parts unknown, to the end that the plaintiff might be prevented from recovering against him;* with an averment that by such removal of the property, and of the said *Peter* himself, to parts unknown, the

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plaintiff has been prevented from recovering his demand of £500, to his damage £700.

To the judgment rendered in this suit the appellant obtained an injunction, on a suggestion that *he* was the real owner of the slaves removed, and not *Peter May*—and further suggesting a variety of matter with a view to show that *Benning's* demand against *Peter May* was overrated by the jury, and the damages excessive—but not charging any surprize at the trial, nor denying that part of the charge in the declaration, which relates to the concealment of *Peter May's own person*, or of his other property, except the slaves. The Chancellor directed a second trial to be had, when the jury found a verdict for £475 6 8, and after some further proceedings in the Chancery Court, not material to my view of the case, dismissed the bill.

The District Court before which the first trial was had was moved for a new trial, and after taking time to consider of the motion, overruled it—after which the appellant applied for and obtained his injunction.

Courts of common law have been with reason very reluctant in granting new trials merely on the ground of excessive damages, in actions founded upon a tort; unless there has been some allegation of surprize upon the party, or some misconduct on the part of the jury. Nor have they of late years in England granted them, without hearing the report of the Judge who presided at the trial. In this case, the Judges who did preside, and hear the evidence were moved for a new trial, and refused it. No exception was taken to any opinion of the court upon the trial, nor was any offered to that overruling the motion. This may be considered as equivalent to the report of the Judge, and a decision at bar on a motion for a new trial. The interposition of a court of equity after such proceedings had, is I believe without example in that country from which we have borrowed our system of jurisprudence, however frequent here, of late years. That such an interposition may sometimes be necessary and proper, especially after trials in the inferior courts I am not disposed to deny. But where the Judges of a Superior Court have presided on a trial, and have on mature deliberation refused to grant a new trial, it would seem to me that the interposition of a Court of Equity should be sparingly administered, unless for some reason which evidently could not have been submitted to the consideration of the court refusing the new trial. And after the solemn deci-

sions of this court in the cases of *Maupin v. Whiting*, and *Terrel v. Dick* (1 Call, 224 and 546) in the former of which it was decided that, where the defence is purely legal, it should be made on the trial at law; and in the latter that, after a cause has been once fully decided at common law, equity ought not to interpose; in both which decisions I most heartily concur; we may hope that the line of demarcation between the two jurisdictions will be more attended to.

The defence in the present case was such as might, and probably was, made at law on the first trial. The papers described by Mr. *Venable* in his deposition, with which *Meredith* furnished his counsel, were probably kept back from the conviction which they felt that those papers were either inadmissible, or unimportant. And as far as I can judge of the contents of them from their titles, I am of the same opinion. The gist of the action was for the *maliciously* aiding *Peter May* to remove HIMSELF and his property to parts unknown to the plaintiff, *to the end that the plaintiff might be prevented from recovering* the money he had been compelled by a legal judgment to pay for him. The *tort* was not confined to the removal of his *slaves*, or other property: it is expressly charged that he aided, assisted, and counselled him to remove *himself* as well as his property; and that he did this *maliciously* with a view to deprive the plaintiff of his legal remedy against him. The whole charge was put in issue by the plea of not guilty—The jury have found the MALICE and the INTENT, as well as the *facts* both with respect to his *person*, and his *property*. A case more properly belonging to the determination of a jury cannot easily occur—they had a right to make the plaintiff a *full compensation* for *all* the inconvenience and expense he had been put to by the defendant's *malicious* conduct. For in matters of *tort* the jury have a right, if they see proper, to give vindictive damages. The case of *Halcomb v. Flournoy*, (2 Call, 433) is altogether different; it was an action of debt, not an action founded on a *tort*. But even in that case a majority of the court thought that the award of the arbitrators, who were jurors of the parties' own choosing, ought to be sustained, notwithstanding the *damages* awarded might have been given in consideration of *injury sustained beyond the principal and interest* of the *money actually paid*. This I think is evident from the award itself; the arbitrators declaring that it appeared to them that the plaintiff had been put to very great trouble and expense by travelling to and from Richmond, and that

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his negroes had been taken in execution to satisfy the judgments against him, and were kept out of his possession and service at various times, from which he sustained losses. If the jury in the present case have exceeded the exact measure of principal and interest paid by *Benning*, we are to presume that they had sufficient evidence before them to satisfy them that he had sustained injury beyond that measure, and that the court also was satisfied on the same point. The second jury gave a verdict for the same sum within £25 which shows they probably proceeded on similar grounds. Such a concurrence ought to have satisfied the Court of Chancery that the first verdict was not unreasonable—I therefore think the dissolution of the injunction, and the final dismission of the bill was perfectly right, and that the decree ought to be affirmed.

Judge ROANE.—It does not satisfactorily appear from the report of the referees, (*Woodson* and others,) or from any other testimony in the cause, that the money recovered from *P. May* and his sureties, in June 1788, was not due by him to his principal. All the defendants were notified of the motion, and this ground of defence was not taken by any of them; but the judgment was acquiesced in. Notwithstanding this judgment, all the securities were *safe*, as long as *P. May* himself had property adequate to the payment of the debt, and within the reach of the process of the court. *Benning*, fearing that the whole, or greater part of the debt would fall on him, in consequence of the eloigning of *May's* property, brought his action against *Meredith* for assisting in carrying away and secreting the property. This action, though, in form, an action of tort, was, in respect of damages, to be regulated by the actual injury *sustained*, or *liable* to be sustained; and if it now clearly appeared that this limit was exceeded by the verdict, I will not say but that that verdict should be pared down to the proper standard. It was not an action sounding merely in damages, but one in which a just criterion was afforded whereby the damages should be estimated.

The injury complained of in the action in Prince Edward District Court was, that, whereas *P. May* had property amply sufficient to pay the whole debt, and thus secure *Benning* from ALL loss whatsoever, this property was eloigned by the defendant *Meredith*, and *Benning* made liable, in the event of his co-securities' insufficiency, to pay the *whole* sum due on the judgment in question, as well as other sums for which *P. May* should be found

to be liable. Admitting that the damages recovered by *Benning* do not exceed what he has paid, and is liable to pay, on account of his suretyship for *May*, the effect of the judgment against *Meredith* is to place him (*Benning*) in the same situation as if *May's* property had never been removed, and was sufficient to pay all his debts as sheriff, for which *Benning* was liable. It substitutes *Meredith*, in lieu of *May*, in standing between *Benning* and loss. It admits that *May* had property enough to effect this object, and that *Meredith* by his act has made the debt his own.

It would be entirely inconsistent with *this idea* to *divide* this debt between *Benning* and *Meredith*, and make *Benning* subject to SOME LOSS; for the jury were satisfied when they rendered their verdict, that *Benning* should be subjected to NO LOSS WHATEVER. Notwithstanding the deposition of one of *Meredith's* counsel in the action at law; as a motion for a new trial was made and overruled, and no exception taken, we must conclude that enough was proved in the action to support the verdict. It would be a dangerous proceeding for us to open a verdict, on the ground of a defence which was known but not used in the trial at law; I here allude to the appellant's claim of property in the slaves removed.

But, however it was in the *first* trial, the appellant might have used this defence in the trial of the issue in the District Court of Richmond. He either did not *then* use it, (and, if so, his omission makes against him in the present case,) or if he did, that defence was reprobated by the jury, (who are the best judges of credibility,) on a full consideration of the testimony in the cause; and this last verdict, concurring with the first would seem conclusive on the point.

The question then recurs, is *John Benning* placed in a better situation by the last verdict, than if *P. May's* property had been sufficient for his indemnification, and had never been eloigned? The report of the commissioner shows that, on the *22d of September* 1802, *Benning* had paid (including the judgment of 1793 for £103 0 9½ and interest on both judgments,) £602 4 7.—If the sum paid with interest on account of the *last* judgment be deducted, he will have paid about £510; and that solely on account of the first judgment; without taking into account the sums which he alleged (and which he MAY have *proved* to the jury) that he was compellable to pay to *private individuals;* or taking into account his *possible* liability to divide with *Charles May* the sum which he (*May*) has been

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compelled to pay, on account of that judgment, or other judgments against *P. May*. Even this last sum, standing singly, exceeds the amount of damages assessed by the Richmond jury, if we were even to add thereto interest up to the date of the commissioner's report. We cannot, therefore, without entirely losing sight of the ground of the action in Prince Edward District Court, which went to an *entire* indemnity of *Benning*, and to place him in the same situation as if *P. May's* estate was yet amenable to the judgments against him, and sufficient to satisfy them, subject *Benning* to any abatement of the sum recovered by the verdict of the Richmond jury. *Meredith* therefore must stand, where the jury of Prince Edward has placed him, as interposing between the surety and *P. May*, and subject to the estimated damages arising from his misfeasance in the instance in question. He does not stand in this case in the light of a security, and as having a claim to contribution from his co-securities; but is to retribute to *Benning* that injury which he has actually sustained by means of his (*Meredith's*) conduct in relation to *May's* negroes. *Benning* therefore is to be protected from ALL loss on account of *P. May's* default in the present instance, within the limits of the sum found by the jury, and is not to divide with *Meredith* the sum actually paid for *P. May*.

My opinion is that the decree is right and should be affirmed.

Judge FLEMING.—This being originally a special action for a *tort* committed by the appellant, *Meredith*, in secretly and maliciously taking and carrying to parts unknown the property of *Peter May*, deputy sheriff of Buckingham County, against whom the plaintiff *Benning* had a legal claim as one of his securities; and also for counselling and assisting the said *Peter* in removing himself to parts unknown, whereby the said plaintiff was prevented from recovering indemnification of the said *Peter;* it appears to me that an inquiry, after the verdict, into the accounts between *Johns*, the high sheriff, his deputies and their securities, and whether *Peter May* was responsible for the malfeasance of *William May* another under-sheriff, was improper; as the whole matter was probably, or might have been before the jury on the trial at law; the result of which was a verdict for £500 damages; and a motion for a new trial to the court that heard the whole evidence, was overruled, after time had been taken to consider the

motion; from which circumstance it is to be presumed that the court was satisfied the verdict was neither contrary to evidence, nor the damages excessive.

The defendant *Meredith*, however, on a suggestion of surprize at the trial, and stating in his bill sundry matters respecting the original controversy, obtained an injunction in the High Court of Chancery, which, after several interlocutory orders, directed a new trial of the issue at law, which was had before the District Court of Richmond: where there was no suggestion of surprize on the part of the defendant; and there, the jury, who were the proper judges of the facts proved by the evidence, and of the measure of damages to be given thereon, assessed the damages to £475 6 8.

This verdict being reported to the High Court of Chancery, a commissioner was directed to report an account of the sum due from *Peter May* to *Johns* the high sheriff, and of the payments made by the sureties respectively: on which report it appeared that *Benning* was a creditor for payments to the amount of £602 4 7; whereupon, on a final hearing of the cause, the plaintiff's bill was dismissed with costs: which, as the controversy between *Benning* and *Meredith* was not a matter of *account*, but simply an action for damages for a *tort*, ought in my conception, to have been done, without reference to a commissioner.

It is a difficult matter to draw the true line between the jurisdiction of courts of law and courts of equity; but there is a well-settled general principle, which admits of but few exceptions; that, where a person, seeking a right, has a complete remedy at law, he shall not go into a court of equity to obtain it; so, on the other hand, where a defendant, in an action at law, has a full and complete defence in his power, and neglects to avail himself of it, he shall not go into a court of equity for relief: and, therefore, courts of equity should be cautious in granting injunctions to judgments fairly obtained at law. The great disproportion between the number of those that are dissolved and of those that are made perpetual verifies the position.

I am, in this case of opinion with the other Judges that the decree, dismissing the bill with costs, is correct, and ought to be affirmed.

By the whole court (consisting of Judges FLEMING, ROANE and TUCKER) the decree of the Chancellor was AFFIRMED.

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2. An action on a joint and several Bond must be brought against *all* the obligors jointly, or *one* of them singly: and not against any intermediate number; and, if it be stated in the declaration that one of the obligors, (who is not sued,) together with others, sealed the Bond, advantage may be taken of the error, notwithstanding there was no plea in *abatement*. *Leftwich & others v. Berkley*—62.

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See EXECUTORS & ADMINISTRATORS.

AFFIDAVIT.

1. *It seems*, that if affidavits be excepted to at the *rules*, and not objected to at the *hearing* in the court of chancery, but allowed to be read, the former exception is waived, and cannot be repeated in the court of appeals. *Rowton v. Rowton*—110. ☞ In this case, two of the judges were of opinion that the affidavits were not entitled to any weight, principally because the magistrate, before whom they were taken, would not permit a friend of the appellee to cross-examine the witnesses; two others were of opinion that the objection was not sustainable, either because the person who wished to interrogate the witnesses did not show that he was an agent of the party, or because, if the objection ever did exist, it was waived by permitting the affidavits to be read at the hearing; and a fifth gave no opinion as to the objections, but commented on the evidence as if the affidavits had been regularly taken.

2. Not a part of the record, unless made so by a bill of exceptions. *Garland v. Bugg*—374.

3. Of two of the jurors that they were influenced by information given by one of their own body, in the jury-room, not a ground for granting a new trial. *Price's Exor. v. Warren Admr. of Fuqua*—385.

4. Sheriff's return of service of a *decree nisi*, or of any paper not directed to him in his official capacity ought to be authenticated by *affidavit*. *Anonymous*—206.

AFRICANS.

1. In a contest for freedom in the case of native *Africans* and their descendants, who have been and are now held as slaves, the *onus probandi* does not lie on the person claiming them as slaves: but it is otherwise with respect to *white* persons and native American *Indians*, and their descendants in the maternal line. *Hudgins v. Wrights*—134—144.

AGREEMENT.

1. *Agreement Parol.* Statute of frauds and perjuries will avail the defendant in equity, although it be not *formally* pleaded: it is sufficient if he merely *rely on it in his answer*, as a ground for not carrying into effect a verbal agreement concerning lands. *Rowton v. Rowton*—92.

2. When the verbal evidence of an agreement is contradictory, the statute of frauds ought especially to apply—*Ibid.*

3. In what cases *one party* is bound to *immediate* performance on his part, though the value of the *consideration* is uncertain; and when that shall *afterwards* be ascertained, may have such remedy

against the other party for the deficiency as shall be equitable. *Long v. Colston.*—111—112.
4. *See* MORTGAGE, Nos. 1, 2.
5. SPECIFIC PERFORMANCE, No. 1.
6. BILL IN CHANCERY, No. 5.
7. As to fraudulent agreements to defeat creditors, *See* FRAUD, No. 2.
8. Whether, on a bill for specific performance of an agreement, a Court of Equity can, in lieu thereof, decree a sum of money absolutely, *See* BILL IN CHANCERY. Nos. 6, 7.
See CONTRACT, Nos. 1, 4.

AMENDMENT.

1. Cannot be made by an inferior court of common law of its own judgments, after the term at which they were rendered. *Halley's Admr. v. Baird & Young.*—25.
2. An executor or adminstrator ought to be permitted, on his *motion*, though not attended with an affidavit, to amend his plea by pleading *fully administered*, at any time before the trial, if the Court be satisfied that the motion is not made for the sake of delay. *Chisholm v. Anthony.*—27.
3. An erroneous entry of a decree may be rectified upon *motion*, at a succeeding term; and any mistake committed by the officers of the court or gentlemen of the bar, may be corrected in like manner. *Marr's Adm'r. v. Miller's Ex'or.* and *others.*—204.

ANSWER IN CHANCERY.

1. Or PLEA, the proper mode of taking advantage of objections which do not appear on the face of the bill itself. *Harris v. Thomas.*—18.
2. An Answer *positively* denying a fact charged in the Bill ought not to be outweighed by testimony *not equally positive* on the other side. *The Auditor, &c. v. Johnson's Ex'x.*—536—542.

APPEAL.

1. Ex'ors. and Adm'rs. not to be required to give security on entering appeals. *Wilson v. Wilson's Adm'r.* 15, and *Sadler's ex'ors. and legatees v. Green.*—26.
2. May be determined in a district court, at the term to which the record is brought up. *Robertson v. Braddick.*—21.
3. The Appellee has a right to bring up the record.—*Ibid.*
4. After two terms have elapsed, since the Appeal, and before the record is brought up, judgment cannot be affirmed, but appeal may be dismissed with costs. *Nelson v. Matthews.*—21.
5. Notice ought to be given of an intention to take up, at the first term, in a chancery case. *Lee v. Frame.*—22.
6. Practice when to take *up* new Appeals.—*Ibid.*
7. Where Ex'ors. and Legatees jointly appeal, the *Legatees* (being in possession of the property) may be ruled to give security. *Sadler's Ex'ors.* &c. *v. Green.*—26.
8. Will be taken up out of its turn on the docket, as a *delay case*, if the only points in it had in another case been decided against the appellant. *Armistead v. Butler's Adm'r.*—177.
9. So also when the counsel for the *appellee* chooses to *confess error*. *Buchanan v. Leeright.*—211.
10. So also, if the counsel for the *appellant* will not say, *in general terms*, that, in his opinion, there is error, but merely states points which do not constitute error. *Garland v. Bugg.*—375.
11. Where the adm'r of the appellee may have the appeal dismis-

sed on *motion*, without a *scire facias*. *Meek*, &c. *v. Baine*.—339.
12. Ought not to be granted to a person not interested. *Sayre v. Grymes*.—404.
13. No appeal lies from an order of a county or corporation court, for binding out an *apprentice*, or for rescinding his indentures. *Coopers v. Saunders* and *Hopkins*.—413.
14. The Court of Appeals has no discretion as to the *costs* of an appeal, but must allow them to the party prevailing. *Cocke, Crawford & Co. v. Robert Pollok & Co.*—499—500.
15. An appeal ought not to be allowed by the Court of Appeals to an order of the Superior Court of Chancery, disallowing a bill of review, although the right of property had been decided, and a writ of *habere facias possessionem* awarded, but an account remained to be taken, and the commissioner's report had not come in. *Bowyer, &c. v. Lewis*.—553.
16. See ATTACHMENT. No. 3.

APPEALS, *Supreme Court of.*

1. RULES OF PRACTICE in I. II. III. and 409.
2. TERMS of—209.

☞ The terms of the Supreme Court of Appeals have since been altered, in consequence of a memorial of the Judges presented to the legislature at its session in December 1807. (See Acts of 1807, ch. xi, p. 21, sect. 1, and Rev. Code, vol. 2, ch. 115, p. 145. They are as follow:

The { 1st to commence the 1st day of *March*, and continue 27 juridical days.
The { 2nd the 15th of *April*, and continue 44 Juridical days.
The { 3d the 1st of *October*, and continue 55 Juridical days.

3. Cannot award a supersedeas to stay proceedings on a judgment or decree of a county court.—*Cheshire v. Atkinson*.—562.
4. See ATTACHMENT, No. 3.

APPEARANCE BAIL.

1. If the plaintiff does not, in the first instance, except to the sufficiency of the appearance bail, he cannot afterwards object to receiving him as special bail. *Dunlops v. Laporte*.—22.
2. After the appearance bail has defended the suit, and pleaded, the defendant may, at a subsequent term, be admitted to appear, give as special bail the same person who was appearance bail, file a plea and go to trial.—*Ibid.*
3. *Appearance* bail admitted as *special*, after four terms of the Federal Court had elapsed, and after a plea had been filed by the appearance bail, on which issue was joined, and a jury had been charged, but not agreeing in their verdict, a juror had been withdrawn. *Main, ex'or. of Hyndman v Turnbull*.—24. *Note.*
4. How judgment to be entered if the appearance bail defend the suit, and afterwards waive his plea. See JUDGMENTS, No. 3, *and* OFFICE JUDGMENT, No. 2.
5. Discharged, if the plaintiff take a confession of judgment against the principal. See OFFICE JUDGMENT, No. 3, and *Fisher and others v. Riddell*.—330. *Note.*
6. If the sheriff return a writ "executed," and the *name* of the appearance bail, but does not return the bail-bond, or a copy thereof, to the clerk's office, together with the writ; judgment ought not to be entered against the defendant and *bail*, but against the defendant and *sheriff*. *Shelton v. Pollock & Co.*—423.

APPRENTICE.

1. No *Appeal* lies from an order of a County or Corporation Court, for binding out an apprentice, or rescinding his indentures. *Billy* and *Jesse Coopers v. Saunders* and *Hopkins*.—413.
2. What is the proper remedy in such case.—*Ibid.* 420.
3. *Quere*, If an apprentice be removed out of the county or corporation in which he was bound, can the court thereof direct the overseers of their poor to send for and bind him to another master?—*Ibid.* 414.
4. Also, *Quere*, Whether an apprentice so removed to a county or corporation, obtains a legal settlement therein by remaining twelve months during his apprenticeship.—*Ibid.* 414.

ASSAULT AND BATTERY.

1. In a joint action of, against twelve defendants, the process having been served on two only, and they having appeared and pleaded not guilty, the jury found them "*guilty*," in general terms, and assessed damages against them *jointly:* the plaintiff, in consequence of an order of the court, released a part of the damages to those defendants, (saying nothing of the others,) and took *judgment* for the residue. After this, he could not proceed to obtain *additional* damages against any of the other defendants. *Ammonett v. Harris* and *Turpin*.—486—499.
2. What course the plaintiff ought to have pursued instead of taking judgment in that case.—*Ibid.* 489.
3. What step the plaintiff ought to take, if the jury in a *joint* action of assault and battery assess the damages severally against the several defendants.—*Ibid.* 490.
4. See DAMAGES, No. 3.

ASSETS.

1. BY DESCENT, where they need not be found by the jury. *Woodford's heir v. Pendleton*.—303.
2. If, on an issue joined on the plea of *plene administravit*, the jury find *assets to a certain amount less* than the plaintiff's claim, judgment ought to be entered, for that amount only payable *immediately*, and for the balance payable *when assets* shall come to the defendant's hands. *Nimmo, ex'or. of Wishart v. The Commmonwealth*.—470.
3. See PLEADING, No. 6.

ASSUMPSIT.

1. General *indebitatus assumpsit* will not lie for the price of a tract of land, but a special action stating the circumstances of the contract. *Hoskins v. Wright, adm'r. of Hoskins*,—378.
2. On the trial of an issue on the *assumpsit of the testator within five years*, an assumpsit of his *executor* cannot be given in evidence to prevent the operation of the act of limitations. *Fisher's exor. v. Duncan* and *Turnbull*.—563.

ATTACHMENT.

1. Will not lie for one *joint* complainant against another who has received more than his proportion of a decree. *Jones v. Jones*.—3.
2. Where debts due to a person *deceased* are attached in chancery by his creditors, his ex'ors. or adm'rs. may appear, file their answers, and have the attachment discharged on their motion, without giving security. *Wilson v. Wilson's adm'rs. &c.*—16.

3. In what case not to be granted by the Court of *Appeals* against a sheriff for carrying into effect an execution under a decree from which an appeal has been granted. *Cheshire v. Atkinson.*—210.

ATTORNEY.

1. A debt due from an attorney to his client for money collected on a *judgment* is only a debt by *simple contract. Gathright v. Marshall, ex'or of Rind.*—427.
2. A suit cannot be maintained in the name of an attorney in fact, even in a *court of equity. Jones v. Hart's ex'ors.*—470—476.
3. See Costs, No. 2.

AUTHORITIES, BRITISH.

1. How far obligatory in our Courts. *Baring v. Reeder.*—158-161-163.

AWARD.

1. Not to be *avoided*, in consequence of any calculations, or grounds for it, taken by the arbitrators, which are not incorporated in it, or annexed to it at the time of delivery. *Taylor's adm'r. v. Nicholson.*—67.
2. Good in other respects, not to be vitiated for containing a matter not mentioned in the submission; but such matter to be rejected as *Surplusage.*—*Ibid.*

BAIL.

1. See Appearance Bail, Nos. 1, 2, 3, 4, 5, 6.
2. *It seems*, that where a judgment is entered in the clerk's office against the defendant and bail, a copy of the *bail-bond* ought to be inserted in the record. *Shelton v. Pollack & Co.*—424.

BILL IN CHANCERY.

1. Complainant should be always ready to support his bill of injunction, even before answer filed. *Radford's ex'ors. v. Innes's ex'x.*—7.
2. May be filed by creditors, admited as new parties, to have distribution of an equitable fund, after a decision by the Court of Appeals remanding a cause to the Superior Court of Chancery; such creditors stating their willingness to contribute to the expenses of the suit. *Anderson v. Anderson* and *others.*—12.
3. Objections apparent on the face of the bill may be *demurred to;* but, if not apparent, advantage should be taken by *plea* or *answer. Harris v. Thomas.*—18.
4. Under what circumstances, and in what courts, a person may file a bill in chancery to contest the validity of a will, after *probate*, See Wills, No. 1, 2, 3.
5. After an action at law has been commenced to recover damages for breach of a contract, the defendant has no right to file a bill to compel the plaintiff to accept a specific performance, unless some particular grounds of equity exist on his behalf, excusing and relieving against such breach, and showing that the contract ought nevertheless, to be specifically enforced. *Long v. Colston.*—110.
6. On a bill for specific performance of an agreement, the court ought not, in lieu thereof, to decree a sum of *money, absolutely*, but may, *conditionally*, giving the defendant his election either to pay the money, or perform the agreement *specifically. Hook v. Rose.*—310.

7. In such case, if the defendant be guilty of contumacy, and the court, from the want of evidence, *which he is bound to disclose*, be not able to direct a specific performance, a sum of money may, in like manner, be decreed for the purpose of compelling the production of such evidence.—*Ib.*
8. Who to be made parties in bills for a discovery and a conveyance; or, if the defendant die, in such cases, against whom the suit is to be revived. *Key's ex'ors. v. Lambert.*—330.
9. Bill for restitution of money paid for certificates which the vendor had no right to sell, *sustained*, and the money decreed to be refunded. *Wise v. Craig.*—578.

BILL OF EXCEPTIONS.

1. When a verdict, on an issue, directed out of chancery, is certified to the court sitting in chancery, a new trial having been moved for and refused, *the allegations relative to what passed at the trial of the issue* stated in a bill of exceptions to the opinion of the court in refusing the new trial, if no *proof* of the truth of those allegations appear on the record, are not to be taken as admitted to be true, by the court's signing and sealing the bill of exceptions. *Ford v. Gardner* and *others.*—72.
2. An affidavit, filed in support of a motion for a *continuance* which was overruled, is not a part of the record, unless it be made so *by a bill of exceptions. Garland v. Bugg.*—374.

BILL OF REVIEW.

1. May be allowed by the Superior Court of Chancery, after affirmance in the Court of Appeals; for *new matter of fact*, but not for *matters of law. M'Call v. Graham* and *Beall.*—13.
2. Not to be allowed on additional circumstances *merely confirming* facts originally proved. *Randolph's ex'or. v. Randolph's ex'ors.* &c. —180.
3. Appeal not to be allowed *by the Court of Appeals* from an order of the Superior Court of Chancery disallowing a bill of review, unless the decree in the original suit had been *final*, and the parties out of court. *Bowyer, &c. v. Lewis.*—553.
4. Note the diversity between a bill of review and a supplemental bill in the *nature* of a bill of review.—*Ibid. 554—559.*

BILL OF REVIVOR.

1. A suit in chancery for a conveyance of lands, in case the defendant dies before a final decree, ought to be revived against his heirs and devisees, and all other persons holding, claiming, or in any manner interested, under him, in the lands in question. *Key's ex'or. v. Lambert.*—330.

BILL SUPPLEMENTAL *in the nature of a bill of review*, See BILL OF REVIEW, No. 4.

BOND.

1. A bond or note taken, on a settlement of accounts, for the balance, *including the interest then due*, cannot be impeached on the ground of usury. *Brown v. Brent.* —4.
2. Given in the paper money times in a *pecuniary* penalty, conditioned for the payment of *tobacco*, how the verdict and judgment should be. See ACTION, No. 5, and the case of *Overstreet &c. v. Marshall.*—381.

3. As to the manner in which suit ought to be brought on a *joint and several* bond. See ACTION, No. 2, and the case of *Leftwich* and *others* v. *Berkeley*.—61—62.
4. An account of *stale* transactions, though partly subsequent to the date of a bond, not to be allowed for the purpose of obtaining discounts against it. *Randolph's ex'or. v. Randolph's ex'ors., &c.*—181.
5. Given in the paper money times, in what case not subject to the scale. *Nicholas's ex'ors. v. Tyler*.—332.
6. A bond being given, conditioned to be void upon the obligor's paying all costs and damages which shall be *awarded* in consequence of the obligee's delivering to him a negro slave, a *judgment* obtained by a third person against the obligee for the same slave is sufficient to warrant an action on the bond, without proof of *satisfaction* of the judgment. *Murrell v. Johnson's adm'r*.—450—453.

BOOKS.

1. When partnership accounts are referred to a commissioner, what books, and with what directions relative thereto, a court of chancery will rule the parties to produce before him. *Calloway* and *Steptoe v. Tate*.—9.

BREACH.

1. After an action at common law has been brought to recover damages for breach of a contract, the defendant has no right to file a bill in equity to compel the plaintiff to accept a *specific performance*; unless some particular grounds of equity exist on his behalf, excusing and relieving against such breach, and showing that the contract ought nevertheless to be specifically enforced. *Long v. Colston*.—110.
2. See PLEADING, Nos. 4, 5.
3. See ACTION, No. 5.

BRITISH DEBTS.

1. The commonwealth is not responsible for the *nominal amount* of money paid into the loan-office in discharge of British debts; but only for its *value*, according to the scale of depreciation. *The Commonwealth v. Walker's ex'or*.—144.

CERTIFICATES.

1. Where taxes were payable in *certificates*, and the sheriff indulged a man for such taxes on certain terms, the value of the certificates, *at the times when payable*, was decided to be the rate at which they ought to be allowed to the sheriff, and not the value *at the time of making the allowance*. *Lipscomb's adm'r. v. Littlepage's adm'r*.—454—470.
2. A person *losing* a public certificate, bearing interest, which never was transferred to him by actual assignment from the original holder, ought not, by a suit in chancery, to obtain its renewal from the commonwealth, without making the original holder a party to the bill. *The Auditor, &c. v. Johnson's ex'x*.—536—542.
3. See BILL IN CHANCERY, No. 9.

CHANCERY.

1. A court of equity may decree against a person within this commonwealth that he shall convey lands lying in another state, or may direct a deed to be cancelled which was fraudulently obtained by him for such lands. *Guerrant v. Fowler* and *Harris*.—5.

2. Court of Chancery always open to *re-instate*, as well as to *grant*, an injunction. *Radford's ex'ors. v. Innes's ex'x.*—7

3. When a creditor of a person deceased has a remedy against his executor or administrator *at law*, he cannot sue *in chancery*, to *establish his demand*. *Bacheldor v. Elliott's adm'r.*—10.

4. Under what circumstances securities of executors and administrators may be sued in chancery, before a *devastavit* is fixed on their principal.—*Ibid.*

5. Court ought to give directions as to reading papers on the trial of issues out of chancery. *Ford v. Gardner, &c.*—72.

☞ See the entry, in the case of *Austin's adm'x. v. Winston's ex'x.* where the Court of Appeals directed what papers should be read in evidence on the trial of the issue.—52—53.

6. *When*, for *what cause*, and *in what court* a person interested in a will may file a bill in chancery to contest its validity after probate. See WILLS, Nos. 1, 2, 3.

7. Court of, may decide on contradictory evidence without directing an issue. *Rowton v. Rowton.*—92.

8. See BILL IN CHANCERY, No. 5.

9. See ACCOUNT, No. 2.

CHANCERY, SUPERIOR COURT OF.

1. RULES OF PRACTICE in, for the RICHMOND DISTRICT, IV—VII, and 19.

2. TERMS of,—For the RICHMOND DISTRICT. (See Acts of 1807, ch. 14, (p. 22) and Rev. Code, 2 vol, ch. 116, (p. 146.)

The 1st to commence the 1st day of *February*, and continue 24 - - - - } Juridical days, if business require.
The 2nd, 1st day of *June*, and continue 24 - -
The 3rd, 1st day of *September*, and continue 24

3, For the WILLIAMSBURG DISTRICT.

The 1st to commence the 1st day of *April*, and continue 24 - - - - - } Juridical days, if business require.
The 2nd, 1st day of *July*, and continue 24 - - -
The 3rd, 12th day of *October*, and continue 24 -

4. For the STAUNTON DISTRICT.

The 1st to commence the 20th day of *March*, and continue 24 - - - - } Juridical days, if business require.
The 2nd, 10th day of *July*, and continue 24 - -
The 3rd, 15th day of *November*, and continue 24

5. The several Superior Courts of Chancery have power to grant *injunctions* to the judgments of all courts of common law within their respective districts, and not otherwise; the *place where the court of law is holden*, and not the *residence of the parties* furnishing the rule of jurisdiction in such cases, *Cocke, Crawford & Co. v. Pollok & Co.*—499.

COMBINATION.

See Fraud, No. 2.

CONFESSION OF JUDGMENT.

1. By the principal discharges the appearance bail. *Fisher and others v. Riddell.*—330. *Note.*

2. By an executor, in an action brought to establish a devastavit, bars relief in equity. *Worsham v. M'Kenzie.*—342.

CONSTRUCTION OF STATUTES.

1. Of the *proviso* relative to the tax on merchants in the revenue law of January 23d, 1799. *Edmonds v. Carpenter.*—340.
2. A *proviso* never *enlarges* the operation of a statute, especially in a *penal law.*—*Ibid.* 342.

CONSTRUCTION OF WILLS.

See DEVISE, Nos. 1, 2, 3,

CONTEMPT.

1. No *contempt* of the *Court of Appeals* in a sheriff to proceed on an execution, *after* an appeal allowed in vacation *by the Judge who pronounced the decree*, but *before* the record is brought up. *Cheshire v. Atkinson.*—210.

CONTINUANCE.

1. Of an *injunction*, ought not to be granted, unless from some very great necessity. *Radford's ex'ors. v. Innes's ex'x.*—5.
2. An affidavit, filed in support of a motion for a *continuance*, is not a part of the record, unless made so by a bill of exceptions. *Garland v. Bugg.*—374.

CONTRACT.

1. Where it may be avoided on the ground of *drunkenness*. *Wigglesworth v. Steers, &c.*—70.
2. A court of equity, unless under particular circumstances, cannot compel a party to accept a specifick performance, after he has elected to proceed at law for damages, for a breach of the contract. See BILL IN CHANCERY, No. 5. *Long v. Colston.*—110.
3. See AGREEMENT, No. 1.
4. A contract under seal decreed, at the instance of one of the parties, to be set aside, as having been vacated and abandoned; the other (at whose request, and for whose benefit, it was expressly made) having for a long time neglected to carry it into effect, and shown, by *particular acts, though without any acknowledgment under seal*, that he considered it no longer as in force. *Cringan* and *Atcheson v. Nicholson's ex'ors.*—429.

CONTUMACY.

See BILL IN CHANCERY, No. 7.

CONVEYANCE.

See DEED, No. 1.

CORPORATION.

1. A bequest being made to the "*Baptist Association* that, *for ordinary, meets at Philadelphia annually*," can a Society, incorporated under the name of *the Trustees of the Philadelphia Baptist Association*, claim by virtue of that bequest, without proving that they were actually *incorporated at the time of the bequest*, and that they are *the same Society intended by the testator? Jones v. Hart's ex'ors.* 471—476.
2. See LEGACY, No. 1.

CORPORATION COURT.

See COUNTY COURT AND APPRENTICE.

COUNT.

1. The *effect* of several counts in a declaration, some good, some bad, and a general demurrer to the whole declaration, the counts being such as could be joined in the same action. See PLEADING, Nos. 7, 8. *Roe v. Crutchfield.*—362.

COUNTY COURT.

1. Notwithstanding a will has been admitted to record in a District Court, a County Court has jurisdiction to try its validity. *Ford v. Gardner* and *others*—74.
2. A county court sitting *in chancery* has a right to direct an issue to be tried on *the common law side* of the same court.—*Ibid.*
3. See APPRENTICE, Nos. 1, 2, 3, 4.

COURSE AND DISTANCE.

1. When a deed mentions the course and distance of a line, *without any other description thereof*, parol evidence is admissible to prove *marked trees*, not in the course or termination of that line, to be the true line intended. *Baker v. Seekright, lessee of Glascock.*—177.

COURT.

1. The court ought to leave the *sufficiency* of the evidence *wholly* to the consideration of the jury and ought not to instruct them that, *from the whole testimony before them, &c. Fisher's ex'or v. Duncan* and *Turnbull.*—564.
2. No inferior court of common law has the power of reversing, altering, or amending its own judgments, after the term at which they were entered. *Halley's adm'r. v. Baird* and *Young.*—25.
3. Need not *actually expunge items*, in an account which bears date more than five years from the death of the testator or intestate, in a suit against executors or administrators: it is sufficient if they direct the *jury* to disregard those items.—*Hoskins v. Wright, adm'r. of Hoskins.*—377.
4. If the court, *at the instance of the defendant*, give an erroneous instruction to the jury, on a point not material, it is no ground for reversing a judgment rendered for the *plaintiff* on other points. *Murrell v. Johnson's adm'r.*—450.

COURTS.

See JURISDICTION.
See GENERAL COURT.

COVENANT.

1. Plea of *not guilty* to an action of, cured by *verdict. Hunnicutt v. Carsley.*—153.
2. See JEOFAILS, Nos. 2, 3.
3. See PLEADING, Nos. 4. 5.

COSTS.

1. On overruling a motion in the Superior Court of Chancery, costs awarded, including an attorney's fee. *Jones v. Jones.*—3.
2. Must be allowed to the party prevailing in the Court of Appeals. *Cocke & Co. v. Pollok & Co.*—499—500.

CREDITOR.

1. May be admitted as a new party to have distribution of an equitable fund, after a decision by the Court of Appeals remanding a cause to the Superior Court of Chancery. *Anderson v. Anderson* and *others.*—12.
2. How far a combination between a creditor and his debtor to defeat other creditors will be relieved against, notwithstanding the defendant relied on the maxim, "*in pari delicto potior est conditio defendentis.*" See FRAUD, No. 2. *Austin's adm'x v. Winston's ex'x.*—33—53.

CREDITOR OF THE COMMONWEALTH.

1. Act of assembly authorising the auditor to issue warrants in favour

of, on any *particular fund*, will no stop the interest on the debt, unless it appear that the fund was sufficient at the time for its payment. *Commonwealth v. Newton, ex'or. of Tucker*.—90.

DAMAGES.

1. In a joint action of assault and battery against several defendants, a *judgment* for *damages against one of them* is a bar to the recovery of additional damages against the rest. *Ammonett v. Harris* and *Turpin*.—488—499.
2. But, where, in such action, on issue, or writ of inquiry, as to *part* of the defendants, the jury assess damages as to *them*, if the plaintiff does not *take judgment* for those damages, he may have other damages assessed on other issues, or writs of inquiry, against the other defendants, and finally take judgment *against any one* of them *pro melioribus damnis*. *Ibid.* —489.
3. *Quere*, Would the case have been otherwise, if the first verdict had only apportioned *upon the defendants then before the court* their *quota* of the damages? *Ibid.* 489 —490—498.
4. If the jury, in a *joint* action of assault and battery, assess the damages *severally* against the several defendants, (the cases of *them all* being before the *same jury*,) it is *error*, unless the plaintiff enter a *nolle prosequi* against all but one, and take judgment for the damages assessed against that one, in which case the error is cured. *Ibid.*—490.
5. In an action *sounding in damages* how far a court of equity ought to interpose to grant a new trial. *Meredith v. Benning*.—585—601.

DATE.

See DEED. Nos. 1, 2.

1. A deed of conveyance for slaves having been signed, sealed, and delivered, with a *blank* left for the date, the donee afterwards inserted the date: no fraud or imposition appearing to have been practised in obtaining it, and no evil design in filling up the blank, the deed was adjudged to be good; the date not being a material part thereof. *Whiting v. Daniel* and *others*.—390.

DEBT. *See* ACTION.

DEBTOR AND CREDITOR.

1. In a suit between, how far a transaction, which was intended *by both* to defraud the other creditors of the debtor, is affected by the maxim, "*in pari delicto potior est conditio defendentis*." See FRAUD, No. 2, and *Austin's adm'x. v. Winston's ex'x*.—33—53.

DEBTOR, PUBLIC. See PUBLIC DEBTOR, No. 1. LIMITATION, ACT OF, No. 1.

DECLARATION. *See* PLEADING.

1. A suit on a joint and several bond must either be brought against *all* the obligors jointly, or *one* of them singly; and not against any intermediate number; and in this case, it *appearing from the declaration* that *seven* obligors sealed the bond, and the suit being against *six* only, the judgment was *reversed*. *Leftwich* and *others v. Berkeley, treasurer*.—61.
2. If there be several counts, *some good*, and *some bad*, but such as could be legally joined in the same action, a *general* demurrer to the declaration ought to be overruled. *Roe v. Crutchfield*.—361—362.

3. In an action of debt, the *declaration* being against A. and B. merchants and partners, and charging that A., *for himself and* B., by his certain bill-penal bound *himself and his heirs*, &c., (the bill penal being in that form,) without containing any farther averments, was adjudged to be insufficient in law to maintain the action. *Shelton v. Pollok & Co.*—423—427.

See ACTION, No. 6.

DECREE NISI.

1. How to be executed. *Anonymous.*—206.

DEED.

1. A person being within the commonwealth may be decreed to execute a conveyance for lands lying in another State, or to cancel a deed for such lands obtained by fraud. *Guerrant v. Fowler* and *Harris.*—5.
2. FOR SLAVES, adjudged to be good where a blank was left for the *date*, which was afterwards inserted by the donee. *Whiting v. Daniel* and *others.*—390.
3. The *date* of such a deed is not a material part thereof. *Ibid.*
4. In what case *parol* evidence is admissible to prove *marked trees* to be the true line intended, tho' not in the course or termination of the line called for in the deed. See COURSE AND DISTANCE, No. 1.

DEMURRER AT LAW.

1. If there be several counts in a declaration, *some good*, and *some bad*, but such as could properly be joined in the same action, a *general demurrer* ought to be overruled. *Roe v. Crutchfield.*—361—362.
2. In such case, if a writ of inquiry be executed after overruling the demurrer, *it seems* the defendant may, nevertheless object to the admission of evidence applying *only to the faulty counts*, and tender a bill of exceptions, or demurrer to the evidence; or may apply to the court to instruct the jury to disregard such faulty counts. But if no such step be taken, and entire damages be given, the verdict is good, and judgment ought not to be arrested. *Ibid.*—362.

DEMURRER IN CHANCERY.

1. To a bill of injunction exhibited on the ground that the plaintiff at law was dead before the judgment ought to be sustained. *Williamson's adm'r. v. Appleberry.*—207.
2. Proper mode of defence, for objections apparent on the face of a bill. *Harris v. Thomas.*—18.

DEMURRER TO EVIDENCE.

1. On a demurrer to evidence, an *unconditional* verdict is not error, provided the demurrer be afterwards determined by the court. *Bigger's adm'r. v. Alderson.*—54—59.
2. Stating, (in *detinue*, that the defendant offered a bill of sale in support of his right, *seems* to be sufficient evidence of the defendant's *possession. Ibid.*—55.

DEPRECIATION, SCALE OF.

1. Where *specie* was lent to the colony of Virginia before the war, a certificate issued during the paper-money times for interest upon it ought to be reduced by the *scale*, and considered as a payment of its nominal amount. *Commonwealth v. Newton, ex'or. of Tucker.*—90.

2. The commonwealth not responsible for the *nominal* amount of money paid into the loan-office in discharge of British debts; but only for its *value according to the scale*. *Commonwealth v. Walker's ex'or.*—144—153.
3. *At what time* the scale, in such cases, is to be applied. *Ibid.*
4. A bond given in the paper-money times is not subject to the scale of depreciation, if it can be shown by *circumstances*, though not appearing on its face, that the debt, out of which it grew, was originally payable in *specie*. *Nicholas's ex'ors. v Tyler.*—332.
5. A writing obligatory, for the payment of *tobacco*, under a *pecuniary penalty*, being executed in the paper-money times, the penalty ought to be reduced by the scale. *Overstreet, &c. v. Marshall.*—382.

DETINUE.

1. The Jury may exceed the prices of the slaves laid in the declaration. *Bigger's adm'r v. Alderson.*—54—61.
2. What evidence of the defendant's *possession* is sufficient, after verdict, a bill of exceptions, or demurrer, stating such evidence. *Ibid.*—55.
3. When detinue will lie for slaves conveyed in trust, the trustee being dead. *Robinson's admr. v. Brock.*—214.
4. What special verdict is insufficient in detinue for slaves. *Ibid.*—214.
5. The defendant having pleaded *non detinet* and a *special plea in bar*, a general verdict for the plaintiff was sufficiently responsive to both the issues. *Garland v. Bugg.*—375.
6. A slave, the property of A., is sold by B. (without authority) to C., and by C. delivered to D.; A. brings an action of detinue, and obtains judgment against C.: he cannot afterwards bring an action for the same slave against D., notwithstanding his judgment against C. is unsatisfied. *Murrell v. Johnson's adm'r.*—450.

DEVASTAVIT.

1. A judgment against an executor or administrator *as such*, with a return on the execution, "that he has removed out of the State," is not sufficient evidence of a *devastavit* to ground an action on the executorial bond. *Turner, &c. v. Chinn, &c.*—53—54.
2. *Quere*, When is a *devastavit* sufficiently established to maintain a suit on an executor's bond? *Ib.*
3. A confession of judgment by an executor in an action brought for a *devastavit* bars his relief in equity. *Worsham v. M'Kenzie.*—342—349.
4. In what cases securities of executors and administrators may be sued in chancery before a devastavit is fixed on their principal. *Bacheldor v. Elliot's adm'r.*—10.

DEVISE.

1. Devise to the testator's two sons and a daughter severally, *for the life of each devisee*, and, after his or her decease, to his or her children; *if none*, to the other two devisees *for life*, and then to be equally divided between their children; and, *if all his children should die without issue of their bodies, his wife living*, the *life estate* should go to his wife *during her natural life*, and, after her death, remainder to other persons:—the two sons and daughter take each an estate for life;

and the remainders over are good, and may take effect; the contingencies not being too remote. *Smith* and *wife v. Chapman* and *others*.—240—303.

2. *It seems* that since the acts for docking entails, the courts *in this country* will not, by implication, turn an express estate for life, with limitations over in remainder, into a fee-tail, as in like cases *in England*.—*Ibid*.—241.
3. A testator by his will, made in 1784, devised certain lands, *with personal estate in the same clause*, to his son, and *his heirs forever; and "if his son should die without a lawful heir*, remainder over to the testator's grandson:" the first devisee took an estate-tail, which was converted into a fee-simple by the act for docking entails; and, on his dying without issue, the lands descended to *his heirs at law*, and did not pass by the will to the grandson of the testator. *Eldridge & another v. Fisher*, 559.

DISCOUNT, See BOND, No. 2.

DOWER.

1. When to be allowed in an *equitable estate in fee simple* contracted by verbal agreement to be conveyed to the husband. See ACTS OF ASSEMBLY, No. 3. *Rowton v. Rowton*.—92.
2. Writ of dower *unde nihil habet* cannot be maintained against a tenant for *years* only, but ought to be brought against a tenant having the *inheritance* or an estate equal in duration to the *life of the demandant* *Miller v. Beverley*.—368—372.

DRUNKENNESS.

1. A contract avoided on that account by the representatives of a party thereto, though such drunkenness not occasioned by the procurement of the other party. *Wigglesworth v. Steers* and *others*.—70—72.

EJECTMENT.

1. That the *term* stated in the declaration of ejectment has expired, previous to the decision on an appeal, is a circumstance of no importance. *Baker v. Seekright, lessee of Glascock*.—177.
2. See PATENT FOR LANDS, Nos. 1, 2.
3. An ejectment does not abate by the death of the lessor of the plaintiff. *Kinney v. Beverley*.—531.

ELECTION.

1. After one party has elected to proceed at law for damages, for breach of a contract, how far a court of equity may interfere. See BILL IN CHANCERY, No. 5.

EMANCIPATION OF SLAVES.

1. A testatrix emancipated her slaves by her will, and directed that a certain tract of land should be sold for the payment of her debts, and that certain monies due her should be applied, when collected, to the same object. The land was sold *for ready money* by her administrator with the will annexed, after advertising the *time* and *place* (without specifying the *terms*) of sale, for *ten days only*, and purchased by himself, before any judgment was obtained against her estate. The slaves were afterwards sold under an execution. On a bill filed by certain of her slaves, claiming the benefit of her will, and suggesting fraud in the management of her estate, it was decreed that

the lands be re-sold, and an account taken; and, if there be not funds sufficient to pay the debt for which they were sold, *that the said slaves be sold for a term of years* to satisfy it. *Patty* and *others v. Colin* and *others*.—519.

EQUITY.

1. A court of, will not grant a *favor* by imposing conditions on the other party. *White v. Fitzhugh, Lewis* and *Johnston*.—1, 2.
2. See JURISDICTION, No. 2.
   See WASTE, No. 1.
3. May decide on disputed facts without a jury. *Rowton v. Rowton*.—93. *Nice v. Purcell*.—372.
4. See EXECUTORS and ADMINISTRATORS, No. 9.
5. What agreement a court of equity will construe as a mortgage. See MORTGAGE, Nos. 1, 2.
6. How far a court of equity will relieve notwithstanding the defendant relied on the maxim "*in pari delicto potior est conditio defendentis*." See FRAUD, No. 2.
7. See WILLS, Nos. 1, 2, 3.
8. See BILL IN CHANCERY, No. 5.
9. It is not a proper ground for going into *equity* that the plaintiff at law was dead before the rendition of the judgment; but the error should be corrected by *writ of error coram nobis. Williamson's adm'r. v. Appleberry*.—206.
10. See BILL IN CHANCERY, Nos. 6, 7.
11. See CONTRACT, No. 4.
12. Relief in, granted where an attachment had issued to compel performance of a decree *entered by mistake. Nelson v. Suddarth*.—350—361.
13. A person coming into a court of equity to impeach a judgment at law must, on his own part do what equity requires. *Lipscomb's admr. v. Littlepage's adm'r*.—455.
14. See INJUNCTION, No. 15.

ERROR.

1. Writ of, *coram nobis*, proper remedy where judgment is obtained in the name of the plaintiff after his death. *Williamson's adm'r. v. Appleberry*.—207.
2. A judgment for the *plaintiff* ought not to be reversed on the ground that the court, at the instance of the *defendant*, gave an erroneous instruction to the jury on an unimportant point. *Murrell v. Johnson's adm'r*.—451.

ESTATES TAIL.

1. Since the Acts of 1776 and 1785 for docking entails, *it seems* that the courts in this country will not turn an *express estate for life* into a *fee tail* by *implication. Smith* and *wife v. Chapman*.—241.

See DEVISE, Nos. 1, 2, 3.

EVICTION.

1. What the vendee of land, on being evicted, is to recover of the vendor. *Lowther v. The Commonwealth*.—202.

See WARRANTY, No. 1.

EVIDENCE.

1. On an issue out of chancery, any papers may be read at the trial in the court of law which were read at the hearing, or at a former trial. *M'Call v. Graham* and *Beall*.—13—15.
2. *Parol*, admissible, of continued possession on the part of the grantor and of the grantee's acknowledgment of his right, as presumptive proof (*against a deed*) that the grantee has relinquished or reconveyed his right. *Bigger's adm'r. v. Alderson*.—54—61.
3. Where the evidence adduced on a trial before a jury does not appear on the record, all must be

presumed to have been legal and right. *Ford v. Gardner* and *others.* —72.

4. On the trial of an issue out of chancery, the court ought to direct what papers should be read in evidence. *Ibid.*

See CHANCERY, No. 5.

5. Where contradictory, a court of equity may direct an issue, or not, at its *discretion*. *Rowton v. Rowton.*—92.

See EQUITY, No. 3.

6. On whom the *onus probandi* lies, where *white* persons, *Indians*, or *Africans* are claimed as slaves.

See ONUS PROBANDI, No. 1.

7. A witness not *immediately* and *certainly*, but *contingently*, interested in the matter in controversy is *competent;* but the jury are to judge of his credibility. *Baring v. Reeder.*—167.

See HUSBAND and WIFE, Nos. 1, 2.

See WITNESS, Nos. 1, 2.

8. Parol, when admissible to prove marked trees not in the course or termination of the line mentioned in a deed to be the true line intended. *Baker v. Seekright, lessee of Glascock.*—177.

9. *Evidence* of facts ought not to be stated in a special verdict; but the *facts themselves* should be explicitly found. *Henderson v. Allens.*—235.

10. Not admissible on the trial of an ejectment to show that a patent was *irregularly* obtained, *Witherinton v. M'Donald.*—307.

11. *Quere*, if admissible *at law* to prove that a *patent* was obtained by *fraud? Ibid* 306—307. *See the case of Hambleton* and *others v. Wells.*—307. *Note.*

12. In what case a sum of money may be decreed to compel the production of evidence. *Hook v. Ross.*—310.

13. Evidence of circumstances not appearing on the face of a bond admitted to show that it ought not to be subject to the scale of depreciation. *Nicholas's ex'ors. v. Tyler.*—332—339.

14. *Circumstantial*, without any acknowledgment under seal, admitted to set aside a contract under seal, as having been vacated and abandoned. *Cringan* and *Atcheson v. Nicholson's ex'ors.*—429.

15. The circumstance that a writing exhibited for *probate* as a last will and testament, was wholly written by the testator himself is *prima facie* evidence that he was in his senses, and able to make a will, at the time of writing the same; so that the *onus probandi*, to repel that presumption, lies on those who wish to impugn it. *Temple* and *Taylor v. Temple.*—476—479.

16. In such a case, proof that the testator's intellects were greatly impaired by the use of opium and ardent spirits, and that, in consequence thereof, he was *frequently* incapable of business, is not sufficient to repel the presumption, without proof that such was his condition *at the time when the writing was executed. Ibid.*

17. Evidence to outweigh an answer *positively denying* a fact charged in a bill ought to be *equally positive. The Auditor v. Johnson's ex'x.*—536—542.

18. On the trial of an issue on the assumpsit of the *testator* within five years, an assumpsit of his executor cannot be given in evidence to prevent the operation of the act of limitations. *Fisher's ex'or. v. Duncan* and *Turnbull.*—563.

19. The *sufficiency* of the evidence ought to be left *wholly* to the consideration of the jury; and the

court ought not to instruct them that, *from the whole testimony* before them, the demand of the plaintiff was not barred, &c. *Fisher's ex'or. v. Duncan* and *Turnbull.*—563.

See FREEDOM SUITS FOR No. 1.

EXCEPTIONS.

1. In what case allegations in a bill of exceptions not to be taken as conclusively true. *Ford v. Gardner* and *others.*—72—73.

See BILL OF EXCEPTIONS.

2. To a commissioner's report, *when* to be taken. *Johnson, &c. v. White's ex'ors.*—201.

EXECUTION.

1. The sheriff's *failing to make a return on an execution* is no ground for reversing a judgment obtained on a forthcoming bond taken in pursuance thereof. *Jones* and *others v. Hull.*—212.

2. See EXECUTORS AND ADMINISTRATORS, Nos. 6, 7.

3. See JUDGMENT, No. 12.

EXECUTORS AND ADMINISTRATORS.

1. When creditor has a remedy against, *at common law*, he cannot sue *in chancery* to establish his demand. *Bacheldor v. Elliott's adm'r.* and *others.*—10.

2. Securities for, cannot be sued in equity until a *devastavit* is fixed in a previous suit, except in certain cases.—*Ibid.* 11.

3. Not to be required to give security on obtaining injunctions, appeals, writs of error, or supersedeas. *Wilson v. Wilson's adm'rs. &c.*—15—16.

4. May discharge an *attachment in chancery*, on *motion*, without giving security.—*Ibid.* 16.

5. When to be permitted to amend plea by pleading *plene administravit. Chisholm v. Anthony.*—27—29.

6. A judgment against an executor or administrator *as such*, with a return on the execution "that he has removed out of the State" is not sufficient evidence of a *devastavit* to ground an action on his bond. *Turner, &c. v. Chinn, &c.*—53.

7. *Quere.* Is it necessary, after such judgment and a return of "no effects" on the execution, to bring a *second suit* to establish a *devastavit* before an action can be maintained on the bond?—*Ibid.*

8. When the administrator of the appellee may have an appeal dismissed on motion. *Meek, &c. v. Baine.*—339.

9. After confessing judgment in an action for a *devastavit*, an executor cannot resort to a court of equity on the ground of his having fully administered. *Worsham v. M'Kenzie.*—342.

10. Items in an account exhibited against, and dated more than five years before the decedent's death may either be expunged by the court, or the jury may be instructed to disregard them. *Hoskins v. Wright, adm'r. of Hoskins.*—377.

11. See ASSETS, No. 2.

12. Case of a fraudulent sale of land by an administrator with a will annexed. *Patty, &c. v. Colin, &c.*—519—520, &c.

13. The assumpsit of the *executor* cannot be given in evidence, on the trial of an issue on the assumpsit of his *testator* so as to prevent the operation of the act of limitations. *Fisher's ex'or. v. Duncan* and *Turnbull.*—563.

FEES.

1. An attorney's fee taxed on overruling a motion in the Superior

Court of Chancery. *Jones v. Jones.* —3.

FEE-TAIL. See ESTATES-TAIL.

FORTHCOMING BOND.

1. Motion on, can only be made on the day to which the notice is given, unless the defendant be called, and the motion entered and continued. *Parker v. Pitts.* —4.
2. Judgment on it sustained, though no return appeared upon the execution. *Jones, &c. v. Hull.*—212.

FRAUD.

1. A deed obtained by fraud may be decreed to be cancelled, if the *defendant reside in this State*, although *the lands lie in another. Guerrant v. Fowler* and *Harris.* —5.
2. Where a transaction between a debtor and creditor is intended by them both to defraud the other creditors of the debtor, but, under all the circumstances of the case, the *debtor* is the *least culpable*; to what extent he may be relieved. *Austin's adm'x. v. Winston's ex'x.* —33.
3. STATUTE OF FRAUDS, will avail the defendant, though not formally pleaded. *Rowton v. Rowton.*—92—93.
4. Ought especially to apply against an agreement, where the verbal evidence of it is contradictory. *Ibid.* 93.
5. See PATENT FOR LANDS, No. 2. DATE, No. 1.
6. A testatrix emancipated her slaves by her will, and directed that a certain tract of land should be sold for the payment of her debts, and that certain monies due her should be applied, when collected, to the same object. A sale of the land by the adm'r. with the will annexed, *for ready money*, after advertising the *time* and *place* (without specifying the *terms*) of sale for *ten days only*, the same being purchased by himself, was decided to be fraudulent. *Patty, &c. v. Colin, &c.*—519—520, &c.
7. *Quere.* Whether, on the trial of an ejectment, evidence is admissible that a patent for lands was obtained by *fraud? Witherinton v. M'Donald.*—306.
8. See MAXIMS, No. 2. BILL IN CHANCERY, No. 9.

FREEDOM, SUITS FOR.

1. Variance between the evidence and the case stated by the plaintiff, in such suits, not to be regarded by the court: but the decision to be according to the rights of the parties, and the case made out by the evidence at the trial. *Hudgins v. Wrights.*—134.
2. If a female ancestor of a person asserting a right to freedom is proved to have been an *Indian*, what it is incumbent on those who claim such person as a slave to prove.—*Ibid.* 135.
3. What is an uncertain and insufficient verdict in. *Pegram v. Isabel.*—387—388.
4. *Quere.* How far the record of a *previous recovery of freedom* by a female ancestor of the plaintiff can be given in evidence? *Ibid.*—388. Also, See VERDICT, No. 11, where this *Quere* is answered.
5. A case of slaves, claiming freedom under a will, filing a bill, against the administrator with the will annexed, suggesting fraud in the management of the decedent's estate, and obtaining relief. *Patty, &c. v. Colin, &c.* —519—531.

GENERAL COURT. See JUDGMENT, No. 12.

GRANT. See PATENT FOR LAND.

GUARDIAN AND WARD.

1. Where a guardian died intestate, and his estate was committed to the sheriff; one of his securities in the bond, given for the performance of his duty as guardian, having also died intestate; a bill was filed on behalf of the wards, against the *heirs* of the guardian, the *sheriff*, the *surviving security*, and the *administrator of the deceased security*, as co-defendants. A decree against the *administrator* of the deceased security (no process having been served on a *part* of the *heirs*, nor on the *surviving security*) was adjudged to be erroneous. *Bland, &c. v. Wyatt, &c.*—543—548.

HABEAS CORPUS.

1. Where a cause is removed by, *quere*, from what stage it should be proceeded on in the *Superior* Court? *Halley's adm'r. v. Baird* and *Young*.—25.

☞ See this doubt removed by act of 1806, ch. 27, sect. 2, (and Rev. Code, vol. 2, ch. 108, sect. 2,) (p. 135,) where it is declared that the cause shall be placed in the same situation as that in which it stood in the *Inferior* Court.

HEIR.

1. See JEOFAILS, Nos. 2, 3.
2. Where the declaration alleges that the heir has assets by descent; if he fails to plead that he has no assets, or does not set them forth in particular, it is not necessary for the jury to find assets. *Woodford's heir v. Pendleton*.—303.
3. See PLEADING, Nos. 4, 5.

HUSBAND AND WIFE.

1. In suits, where the husband is not *immediately* and *certainly* interested, but may be so eventually, the wife is a competent witness; but the jury are to judge of her credibility. *Baring v. Reeder*.—154.
2. In trover by R. against B., for goods which had been lent by B. to the wife of C., and conveyed by C. to R., the wife of C. is a competent witness.—*Ibid.*
3. Slaves conveyed, in *trust*, to the use of, for life, and for the life of the survivor, and, after the deaths of both, to the use of the children of the marriage, &c. pass in *strict settlement*, and, in the event of both dying without issue or appointment, shall not go altogether to the heirs of the *husband*; but those conveyed to the use of *the heirs of the wife* shall go to her next of kin. *Robinson's adm'r. v. Brock*.—212.

ILLEGAL CONTRACT.

See FRAUD, No. 2.

IMPLICATION.

1. See DEVISE, No. 2.
2. Mere *Implication* is not sufficient to authorize the awarding of interest from a period antecedent to the time appointed for the payment of money: an express stipulation to that effect is necessary. *Buchanan v. Leeright*.—211.

INDEBITATUS ASSUMPSIT.

See ASSUMPSIT.

INDEMNIFICATION.

1. An action on a bond of indemnification may be maintained by the

obligee on the rendition of a *judgment* against him, without proof of *satisfaction* of such judgment. *Murrell v. Johnson's adm'r.*—450.

INDIANS.

1. When native American Indians or their descendants in the maternal line are claimed as slaves, on whom the *onus probandi* lies. See ONUS PROBANDI, No. 1.
2. *It seems* that no native American Indian could be made a slave, under the laws of Virginia, since the year 1691. *Hudgins v. Wrights.* —134.

☞ It has since been solemnly decided (in the cases of *Pallas, Bridget*, and *others* v. *Hill* and *others*, March Term, 1808,) on the authority of manuscript acts of assembly in the *Monticello* library, and in the possession of one of the reporters (*Wm. W. Hening*) that the right of making slaves of Indians was taken away by an Act of 1691, from which the Act of 1705 (which has heretofore been considered as the first law restricting the right) appears to be a literal transcript; consequently that "no native American Indian "brought into Virginia since the "year 1691 could, under any cir- "cumstances, be lawfully made a "slave."

INJUNCTION.

1. If, at any time, the security for prosecuting an injunction shall prove to be insufficient, the court will require unexceptionable security to be given. *Ross v. Pleasants, Shore, & Co., and others.* —1.
2. *Where one of the defendants dies*, the court, on the motion of the others, will make a rule that the injunction shall stand dissolved, unless the complainant will revive it against the representatives of the deceased, within a given time after they shall have qualified. *White v. Fitzhugh, Lewis* and *Johnston.*—1.
3. Court will dissolve, though a trial at law has been directed, and no verdict certified, if it be satisfied that it ought to have been dissolved on the former motion. *Vass v. Magee.*—2.
4. When no motion to dissolve till cause set for hearing on the court docket, hearing to be final. *Byrne v. Lyle.*—7.
5. Motion to dissolve never to be continued, unless from *great necessity. Radford's ex'ors. v. Innes's ex'x.*—7.
6. Court always open to *reinstate* as well as to *grant.*—*Ibid.*
7. Complainant should always be ready to prove the allegations in his bill, even before answer filed. —*Ibid.*
8. To stay waste, proper subject for the jurisdiction of a court of equity, though another remedy given by act of assembly. *Harris v. Thomas.*—18.
9. *Where the complainant dies*, after answer filed, an order may be obtained, that, unless his representatives shall appear, within a certain time fixed by the court, and cause the suit to be revived in their names, the injunction shall stand dissolved. *Carter v. Washington* and *others.*—203.
10. *Where the defendant dies*, after answer filed, an order may be obtained, on the motion of his representatives, that, unless the complainant, within a certain time fixed by the court, shall revive the suit against them, the injunction shall stand dissolved. *Kenner v. Hord.*—204.

11. Bills of, filed before the 20th of January, 1804, not to be *dismissed* at the next term after the injunction *dissolved*. *Gallego v. Quesnall's adm'r.*—205.

12. Not to be granted on the ground of the death of the plaintiff at law before the judgment. *Williamson's adm'r. v. Appleberry.*—206.—In such case the legal representative of the decedent may demur to the bill.—*Ibid.* 207.

13. Where an injunction is granted to a judgment, and an account between the parties directed, the commissioner ought not to give the plaintiff at law credit for claims not exhibited to the jury, nor mentioned in the answer, and which are prior in date to the commencement of the suit. *Lipscomb's adm'r. v. Littlepage's adm'r.*—453—470.

14. The several superior courts of chancery have power to grant injunctions to the judgments of all courts of common law *within their respective districts*, and not otherwise. *Cocke, Crawford & Co. v. Robert Pollok, & Co.*—499.

See CHANCERY, SUPERIOR COURT OF, No. 5.

15. After a verdict for the plaintiff in an action *sounding in damages*, and a refusal by the court of law to grant a new trial, a court of equity ought *cautiously* to interpose. *Meridith v. Benning.*—585.

INSTRUCTION TO THE JURY.

1. If the court, *at the instance of the defendant*, give an erroneous instruction to the jury, on an *immaterial* point, it is no ground for reversing a judgment given for the *plaintiff* on other points which are *material*. *Murrell v. Johnson's adm'r.*—450.

2. See JURY, No. 1.

INTEREST ON MONEY.

1. Not usurious to take a bond for balance due on account, *including the interest then due*, and to receive interest thereupon. *Brown v. Brent.*—4.

2. On claims against an insolvent debtor whose lands were decreed to be sold, interest allowed only to the time when the proceeds came into the hands of commissioners. *Anderson v. Anderson* and *others.*—13.

3. On debt due from the commonwealth interest not stopped by an act of assembly authorising the auditor to issue warrants, on a *particular fund*, unless it appears that the fund was sufficient at the time for its payment. *Commonwealth v. Newton, ex'or. of Tucker.*—90.

4. INTEREST WARRANT drawn during the existence of paper-money, for a specie debt, is subject to the scale.—*Ibid.*

5 Not to be allowed from a period antecedent to the time of payment, without an express stipulation. *Buchanan v. Leeright.*—211.

INTEREST *in controversy.*

1. An appeal or supersedeas to a judgment ought not to be granted to any person not appearing to be *interested* in the matter in controversy. *Sayre, adm'r. of Grymes, v. Grymes.*—404.

INSOLVENT DEBTOR.

1. Rule relative to the distribution of the property of a *living* insolvent debtor among his creditors. *Anderson v. Anderson* and *others.*—12.

2. To what time interest allowed on the respective claims. *Ibid.*—13.

See INTEREST *on money*, No. 2.

See LIEN.

ITEMS *of an account.*

1. Which bear date more than five years before the death of the testator or intestate, whether to be *expunged* by the court, or the jury to be *instructed* to disregard them. See ACCOUNT, No 3.
2. See INJUNCTION, No. 13.

ISSUE OUT OF CHANCERY.

1. What papers to be read on the trial of. *M'Call v. Graham* and *Beall.*—13. *Ford v. Gardner, &c.* —72. See also CHANCERY, No. 5.
2. The Court of Chancery ought to give directions concerning the reading of the papers filed in the cause: otherwise the omission to read any of them is no ground of reversing the decree, if a new trial be refused. *Ford v. Gardner &c.*—72—85.
3. Allegations relative to what passed at the trial of such issue, if no proof of the truth thereof appear on the record, are not to be taken as admitted to be true by the court's signing and sealing a bill of exceptions.—*Ibid.* 72—73.
4. "To try the *validity* of a will" is the same with an issue "whether the writing in question is the will or not."—*Ibid.*—74—85.
5. May be directed by a county court *sitting in chancery* to be tried on the *common law side* of the same court.—*Ibid.*—74—85.
6. The directing of, is *discretionary* with a court of equity. *Rowton v. Rowton*—93. *Nice v. Purcell.*—372.
7. After two concurring verdicts for the same party, the chancellor is not bound to direct a new trial, notwithstanding both verdicts were in opposition to the opinions of the Judges before whom the issues were tried, and a verdict had originally been rendered in favour of the other party. *M'Crae's ex'ors. v. Wood's ex'or.*—548.

JEOFAILS.

1. Plea of *not guilty* to an action of *covenant* cured by verdict. *Hunnicutt v. Carsley.*—153.
2. Also a *defective* setting forth of *title by descent* in an action *by an heir* for breach of covenants contained in a conveyance of lands to his ancestor *Woodford's heir v. Pendleton.*—303—306.
3. Also a defective plea and issue joined thereupon, in an action *against an heir* on his ancestor's *covenant.*—*Ibid.*

See PLEADING, Nos. 4, 5.

JOINT AND SEVERAL.

1. In what manner an action is *to* be brought on a joint and several bond. See ACTION, No. 2.

JUDGMENT.

1. Cannot be *affirmed*, after two terms have elapsed, since the appeal, and before the record is brought up, but the appeal may be dismissed with costs. *Nelson v. Matthews.*—21.
2. Of *inferior* court of common law, when not to be reversed, altered, or amended by that court. *Halley's adm'r. v. Baird* and *Young*, —25. See COURT, No. 2.
3. To be entered against the *defendant*, as well as against the *appearance bail*, when the *bail* set aside the office judgment, and afterwards waived his plea. *Vanmeter, &c. v. Fulkimore.*—329. See CONFESSION OF JUDGMENT, No. 1.
4. *Confession of*, in an action for a *devastavit* bars an executor from going into equity on the ground

of fully administered. *Worsham v. M'Kenzie.*—342.

5. How to be entered on a bond given in the paper-money times, with a *pecuniary* penalty, conditioned for the payment of *tobacco*. See ACTION, No. 5, *and the case of Overstreet v. Marshall.*—381.

6. A debt due from an attorney to his client, for money collected on a *judgment*, is only a debt by *simple contract. Gathright v. Marshall, ex'or. of Rind.*—427.

7. How to be entered where the sheriff returns the *name* of the appearance-bail, but not the *bail-bond*, or a copy thereof. *Shelton v. Pollock & Co.*—424.

8. A bond being given, conditioned to be void upon the obligor's paying *all costs and damages which shall be awarded* in consequence of the obligee's delivering to him a negro slave, a JUDGMENT obtained by a third person against the obligee for the same slave is *sufficient* to warrant an action on the bond. *Murrell v. Johnson's adm'r.*—450—453.

9. A judgment against *one* person in an action of detinue for a slave, is, while unsatisfied, a bar to another action, for the same slave, and by the same plaintiff, against another person.—*Ibid.*

10. See INSTRUCTION TO THE JURY.

11. How to be entered when, on the plea of *fully administered*, the jury find assets to a less amount than the plaintiff's claim. See ASSETS, No. 2.

12. The law which directs the clerk of the Court of Appeals to transmit copies of judgments to the clerks of *District* Courts, and authorizes executions thereon *in vacation*, does not extend to the *General* Court. See *Note*, p. 488.

13. In a *joint* action of assault and battery, a judgment against one of the defendants is a bar to the recovery of additional damages against the rest. *Ammonett v. Harris* and *Turpin.*—488—499.

JURISDICTION.

1. A person being within the commonwealth may be decreed to execute a conveyance for lands lying in another State, or to *cancel* a deed for such lands obtained by *fraud. Guerrant v. Fowler* and *Harris.*—5.

2. When a creditor has a remedy against executors or administrators *at common law*, he cannot sue *in chancery* to establish his demand. *Bacheldor v. Elliott's adm'r.* and *others.*—10—12.

3. An injunction to stay waste is a proper subject for the jurisdiction of a *court of equity*, though a remedy *at law* is given by an act of assembly. *Harris v. Thomas.*—18.

4. A county court *in chancery*, has jurisdiction to try the validity of a will which has been admitted to record in a *district court*; and may direct an issue to be tried on the law side of its own court. *Ford v. Gardner, &c.*—74.

5. The *place* where the court at law is holden, and not the *residence* of the parties, furnishes the rule of jurisdiction in granting injunctions. *Cocke, Crawford, & Co. v. Robert Pollok & Co.*—499.

6. A court of chancery cannot transfer a cause from the jurisdiction of a court of law to its own tribunal, after the plaintiff had elected to proceed at law for damages for an alleged breach of contract, unless some peculiar grounds of equity exist, excusing and relieving against such breach, and showing that there ought, nevertheless, to be a specific performance of the agreement. *Long v. Colston.*—110.

JURY.

1. The *sufficiency* of evidence ought to be left *wholly* to the consideration of the *jury;* and therefore, the *court* ought not to instruct them, that, *from the whole testimony before them* the plaintiff was not barred by the act of limitations. *Fisher's ex'or. v. Duncan* and *Turnbull.*—564.
2. What evidence may be given, and under what circumstances, to induce a jury to presume a *release* or *reconveyance. Bigger's adm'r. v. Alderson.*—54.
3. On a trial by jury, if the evidence adduced do not appear on the record, all must be presumed to have been legal and right. *Ford v. Gardner,* and *others.*—72.
4. Verdict of, must answer to the whole case put in issue. But if, in detinue, the defendant plead *non detinet* and a special plea in bar, to which there is a general replication and issue, a general verdict for the plaintiff will be considered sufficiently responsive to both the issues. *Garland v. Bugg.*—374.
5. If instructed by the court to disregard items, in an account, which bear date more than five years before the death of the testator or intestate, it is as well as if the *court had actually expunged* those items. See ACCOUNT, No. 3.

LAND.

1. General *indebitatus assumpsit* will not lie for the price of a tract of land; but a special action should be brought stating the circumstances of the contract. *Hoskins v. Hoskins's adm'r.*—378.

See COURSE AND DISTANCE, No. 1.

LEGACY.

1. *Quere.* Is a bequest of personal estate "to the Baptist Association, that for ordinary, meets in "Philadelphia annually, to be a "perpetual fund for the education of youths of the Baptist denomination who shall be promising for the ministry, always "giving a preference to the descendants of the family of the "testator's father," sufficiently *definite* and *certain* to be carried into effect?

Can a society, incorporated under the name of the trustees of the *Philadelphia Baptist Association,* claim by virtue of that bequest, without proving that they were actually incorporated at the time the legacy was given, and that they are the same society intended by the testator? *Jones v. Hart's ex'ors.*—470.

LEGATEES.

1. Being in possession of the property in dispute, and appealing jointly with *executors,* may be ruled to give security. *Sadler's ex'ors. and legatees v. Green.*—26—27.

LIEN.

1. A creditor (of an insolvent debtor who is living) having a *lien on a specific fund,* and a decree against it, which proves *insufficient,* does not thereby acquire any *lien,* more than he had before upon the *general* fund. *Anderson v. Anderson* and *others.*—12—13.

LIMITATIONS, ACT OF.

1. Will not bar a motion in behalf of the commonwealth against a person accountable for public money. *Kemp v. The Commonwealth.*—85.
2. Items in an account exhibited against an executor or admini-

strator which are barred by, may either be expunged by the court, or the jury may be instructed to disregard them *Hoskins v. Wright, adm'r. of Hoskins.*—377.

3. On the trial of an issue on the assumpsit of the *testator* within five years, the assumpsit of his *executor* cannot be given in evidence to prevent the operation of. *Fisher's ex'or. v. Duncan* and *Turnbull.*—563.

LINES OF LAND. See COURSE AND DISTANCE, No. 1.

MARKED TREES.

Where parol evidence may be given to prove marked trees to be the true line intended, although they are not in the course or termination of the line called for in the deed. See COURSE AND DISTANCE, No. 1.

MARRIAGE-SETTLEMENT.

1. By a marriage-settlement certain slaves are conveyed in trust for the use of the husband and wife for life, and for the life of the survivor; and, after the deaths of both, for the use of the children of the marriage; and, if there be no child, a part of the said slaves for the use of the *heirs of the husband*, or of such person as *he* shall appoint and direct; and another part for the use of the *heirs of the wife*, or to be disposed of as *she* shall appoint and direct.—The wife dies, in the lifetime of the husband, without any child; and the husband dies, having all the slaves in his possession, no appointment having been made. The heirs of the *husband* shall not take those conveyed to the use of the heirs of the *wife*; but they shall go to her next of kin. *Robinson's adm'r. v. Brock.*—212.

2. In such case the trustee being dead, the heirs of the husband or wife may maintain an action of detinue for the slaves conveyed to their use respectively. *Robinson's adm'r. v. Brock.*—212.

MAXIMS.

1. How far a fraudulent agreement is affected by the maxim, *in pari delicto potior est conditio defendentis.* See FRAUD, No. 2.

2. As to a case in which the above maxim did not apply. See *Wise v. Craig.*—578.

MERCHANT-TAX.

1. *When* it became payable on *more than one* store. *Edmonds v. Carpenter, commissioner of the revenue.*—341.

See CONSTRUCTION OF STATUTES, No. 1.

MISTAKE.

1. See AMENDMENT, No. 3.
2. EQUITY, No. 3.
3. RENT, No. 1.

MORTGAGE.

1. What agreement of the parties in relation to slaves will be construed as a mortgage. *Moore's ex'or. v. Aylett's ex'or. &c.*—29.

2. If it be agreed between a mortgagor and mortgagee that, in case the debt be not paid, the mortgagee may sell the property; and, in consequence thereof, *he sells*, without any fraud; he is accountable to the mortgagor for the *surplus* of the sum, for which he sells, above the amount of the debt, with interest on such *surplus* till paid, but not for *profits*, unless he appear to have received them prior to the sale, nor for the *value of the property*, at any sub-

sequent time. *Moore's ex'or. v. Aylett's ex'or. &c.*—29.

MOTION.

1. Costs allowed on overruling a motion in the Superior Court of Chancery, including an attorney's fee. *Jones v. Jones.*—3.
2. On a forthcoming bond, can be made only on the day to which the notice is given, unless the defendants be *called*, and the motion *entered and continued*. *Parker v. Pitts.*—4.
3. See AMENDMENT, No. 2.
4. AMENDMENT, No. 3.
5. SCIRE FACIAS, No. 1.

NEW TRIAL.

1. Where it ought not to be granted on *affidavit* of two of the jurors. See AFFIDAVIT, No. 3.—*Price's ex'ors. v. Fuqua's adm'r.*—385.
2. Though a trial at law has been directed (after a bill filed in equity, and an injunction awarded) and no verdict be yet certified, the Court of Chancery will set aside the order, and dissolve the injunction, if it be satisfied that it ought to have been dissolved on the former motion. *Vass v. Magee.*—2.
3. After two concurring verdicts for the same party, on an issue directed by the chancellor to be tried at law, he is not bound to direct a *new trial*, notwithstanding both verdicts were in opposition to the opinions of the Judges before whom the issues were tried, and a verdict had originally been rendered in favour of the other party. *M'Rae's ex'ors. v. Woods's ex'or.*—548.
4. After a verdict for the plaintiff in an action *sounding in damages*, and a *refusal* by the court of law to grant a *new trial*, a court of equity ought *cautiously* to interpose. *Meredith v. Benning.*—585.

NOTICE

Ought to be given of an intention to take up an appeal, at the first term, in a chancery case. *Lee v. Frame.*—22.

OBLIGATION. *See* BOND.

OFFICE-JUDGMENT.

1. How it may be set aside by the appearance-bail, and how he may afterwards enter himself special bail. *Dunlops v. Laporte.*—22—23—24.

See APPEARANCE-BAIL, Nos. 1, 2.

2. If an office-judgment be set aside, and the suit be defended by the appearance-bail, and he afterwards waives his plea, judgment is to be entered against the *defendant* as well as the *bail*. *Vanmeter* and *others v. Fulkimore.*—320.
3. But, if, after office-judgment, the defendant appear, and confess judgment, the appearance-bail is discharged, and the plaintiff cannot proceed to judgment against *him*. *Fisher* and *others v. Riddell.*—330. *Note.*

ONUS PROBANDI.

1. Where *white* persons, or native American *Indians*, or their descendants in the maternal line, are claimed as slaves, the *onus probandi* lies on the claimant, but it is otherwise with respect to native *Africans*, and their descendants, who have been, and are now held as slaves. *Hudgins v. Wrights.*—134.
2. On whom the *onus probandi* lies, when a will is exhibited for probate, which is written *wholly* in

the hand-writing of the testator. See WILLS, Nos. 8, 9, 10.

PARTIES.

1. *New*, may be admitted for a distribution of equitable funds, after a decision by the Court of Appeals, remanding a cause to the Court of Chancery. *Anderson v. Anderson* and *others*.—12—14.
2. *Who* ought to be made parties, in bills for discovery, or a conveyance. *Key's ex'ors. v. Lambert.* —330.
3. Or in bills of revivor. *Ibid.*—330 —331.
4. See CERTIFICATES, No. 2.
5. A bill was filed, on behalf of certain infants, against the *heirs* of their guardian who died intestate, the *sheriff* to whom his estate was committed, (no *administrator* having qualified.) his *surviving security* in the bond given for the performance of his duty as guardian, and the *administrator of the other security*, as *co-defendants*. No process having been served on a *part of the heirs*, nor on the *surviving security*, a decree against the administrator of the *deceased security* was decided to be erroneous, because there were not *proper parties convented* before the court; and the cause was remanded for further proceedings. *Bland, &c. v. Wyatt, &c.*—543—548.

PARTNERSHIP.

1. Where partnership accounts are referred to a commissioner, the court will rule the parties to produce before him any books and papers which relate to the *partnership*, but will direct the commissioner to disregard such parts as relate to the private affairs of either party. *Calloway* and *Steptoe v. Tate.*—9.
2. In *assumpsit* for a partnership demand, defendant cannot give in evidence as a set-off, the delivery of goods to an individual partner. *Armistead v. Butler's adm'r.*—176.
3. Where one partner binds himself, his heirs, &c., by a bond, and signs it "*for himself and the company*," a *declaration in debt against the company*, charging that he bound "*himself and his heirs for himself and the company*," without containing any farther averments, is insufficient to maintain the action. *Shelton v. Pollok & Co.* 423—427.

Quere. Whether on a bond, in that form, *any action can be maintained* against the *company?*

PATENT FOR LANDS.

1. In ejectment, evidence cannot be introduced to prove that a patent was *irregularly* obtained.—*Witherinton v. M'Donald.*—306.
2. *Quere.* Whether, *at law*, evidence is admissible that a patent was obtained *by fraud? Ibid.* 306 —307.

PAUPERS.

See FREEDOM SUITS FOR, Nos. 1, 2.
INDIANS, Nos. 1, 2.
ONUS PROBANDI, No. 1.
VARIANCE, No. 1.

PHILADELPHIA BAPTIST ASSOCIATION.

See ATTORNEY, No. 2.
CORPORATION, No. 1.
LEGACY, No. 1.

PLEA,

1. Or answer, proper mode of defence, for objections which do not appear on the face of the bill. *Harris v. Thomas.*—18.
2. When an executor or administrator ought to be permitted to amend. See AMENDMENT, No. 2.

PLEADING.

1. An issue out of chancery, to try the validity of a will, being made up, on the question "whether the "*will was valid*, or not," has the same effect as if it had pursued the words of the act of assembly, "whether the *writing be the will* of the testator, or not." *Ford v. Gardner* and *others*.—74.
2. How to declare on a joint and several bond. See ACTION, No. 2. DECLARATION, No. 1.
3. The statute of frauds *merely relied on in the answer*, as a ground for not carrying into effect a verbal agreement concerning lands, will avail the defendant as much as if it had been *formally pleaded*. *Rowton v. Rowton*—92.

See AGREEMENT, No. 4. FRAUD, No. 3.

4. In an action *by the heir* for breach of covenants contained in a conveyance of lands to the ancestor, if the declaration avers the entry, seisin, and death of the ancestor, "and that the lands, covenants, and writings, aforesaid, have descended on the plaintiff," without setting forth the manner in which he derived his title, it is good *after verdict*. *Woodford's heir v. Pendleton*.—303.
5. In an action *against the heir*, on a covenant entered into by the *ancestor*, if a breach be assigned to have been committed both by the ancestor and the defendant, the defendant pleads "that *he has not broken the covenant*" without saying anything as to the breach by the ancestor; and the jury find for the plaintiff "*that the defendant has broken the covenant*,"—judgment ought not to be arrested; the defect being cured by the act of jeofails.—*Ibid.*
6. Where the declaration alleges that the heir has assets by descent; if he fail to plead that he has no assets, or does not set them forth in particular, it is not necessary for the jury to find assets. *Woodford's heir v. Pendleton*.—303.
7. If there be several counts in a declaration, and any *one* of them good, though all the rest be faulty, a general demurrer to the declaration ought to be overruled, and judgment entered for the plaintiff; provided the counts can be properly joined in the same action. *Roe v. Crutchfield*.—362.
8. In such case, if a writ of inquiry be awarded, after overruling the demurrer, *it seems*, that the defendant may, nevertheless, object to the admission of evidence applying only to the faulty counts, and tender a bill of exceptions, or demurrer to the evidence; or may apply to the court to instruct the jury to disregard such faulty counts. But, if no such step be taken, and entire damages be given, the verdict is good, and judgment ought not to be arrested.—*Ibid.* 365—366.
9. In *detinue*, the defendant pleaded the general issue and a special plea in bar; to which there was a general replication and issue. A verdict, *in general terms*, for the *plaintiff*, was considered sufficiently responsive to both the issues. *Garland v. Bugg*.—374.
10. See ACTION, No. 5.

PLEDGE.

1. Under what circumstances considered a *mortgage*, and how far the *mortgagee* is accountable, if he sell the property, in consequence of an agreement with the *mortgagor*. See MORTGAGE, No. 1.

PRACTICE.

1. RULES OF, in the Court of Appeals. I, II, III, and 409.
2. RULES OF, in the Superior Court of Chancery for the Richmond District. IV, V, VI, VII, and 19.
3. Where injunction has abated by the death of *one* of the defendants what step may be taken on the motion of the others. See INJUNCTION, No. 2. *White v. Fitzhugh, Lewis* and *Johnston*.—1.
4. When objection to a bill is apparent on its face. *Harris v. Thomas*.—18.
5. When not apparent on the bill itself. *Ibid.*
6. At what term to take up new appeals.—*Lee v. Frame*.—22.
7. After the appearance-bail has defended the suit and pleaded. *Dunlops v. Laporte*.—23. See APPEARANCE BAIL, Nos. 1, 2, 3.
8. An appeal will be taken up out of turn, as a delay case, where the only points in the cause have been decided in another case, against the appellant. *Armistead v. Butler's adm'r*.—177.
9. When exceptions may be taken to a commissioner's report. *Johnson* and *others v. White's ex'or*.—201.
10. Where the *complainant* in a bill of injunction dies after answer filed. *Carter v. Washington* and *others*.—203.
11. Where the *defendant* in a bill of injunction dies after answer filed, step to be taken on the motion of his representatives. *Kenner v. Hord*.—204.
12. How and when mistakes in entering decrees, &c. may be rectified. *Marr's adm'r. v. Miller's ex'or.* and *others*.—204.
13. How the service of a *decree nisi* by a sheriff ought to be verified. *Anonymous*.—206. See OFFICE JUDGMENT, Nos. 2, 3.
14. Where there are several counts in a declaration, *some good, some bad*, what steps may be taken by the defendant, after his general demurrer is overruled. *Roe v. Crutchfield*.—365—366.
15. A motion on a forthcoming bond can only be made on the day to which the notice is given, unless the defendants be *called*, and the motion *entered* and continued. *Parker v. Pitts*.—4.
16. A supersedeas improvidently awarded by the Court of Appeals, which went to stay proceedings on a decree of a *county court*, may be quashed on *motion*. *Cheshire v. Atkinson*.—562.
17. A motion to dissolve an injunction ought never to be *continued*, unless from some very great necessity. *Radford's ex'ors. v. Innes's ex'x*.—7.
18. The Court of Chancery is always open to *reinstate*, as well as to *grant* an injunction. *Ibid.*
19. The complainant should always be ready to prove the allegations in his bill of injunction, even before answer filed. *Ibid.*
20. Where an executor or administrator ought to be permitted to amend his plea. See AMENDMENT, No. 2.
21. On issues out of chancery the court ought to give directions as to the reading of papers. *Ford v. Gardner* and *others*.—72.
22. The statute of frauds, *relied on in the answer*, as a ground for not carrying into effect a verbal agreement concerning lands, will avail the defendant, although it be not *formally pleaded*.—*Rowton v. Rowton*.—92—93.

PRESUMPTION.

1. Under what circumstances *parol* evidence of the grantors continu-

ed possession, and of the grantee's acknowledgment of his right may be admitted as evidence, for the jury to *presume* (against a *deed*) that the grantee had released or reconveyed his right. *Bigger's adm'r. v. Alderson.*—54.

2. On a trial by jury, if the evidence adduced does not appear on the record, all must be presumed to have been legal and right. *Ford v. Gardner.*—72.

PROFITS.

1. Mortgagee selling property without proof of fraud, in consequence of an agreement between him and the mortgagor, is not liable for *profits*, unless he appear to have received them previous to the sale. *Moore's ex'or. v. Aylett's ex'or.*—29.

PROVISO.

1. As to the construction of the proviso, in the revenue act of the 23d of January 1799, respecting merchant's licenses. See CONSTRUCTION OF STATUTES, Nos. 1, 2.

PUBLIC DEBTOR.

1. Cannot avail himself of the statute of limitations, on a motion at the suit of the commonwealth, for monies which he had received under an erroneous construction of an act of assembly. *Kemp v. The Commonwealth.*—85.

RECEIVERS OF PUBLIC MONEY.

1. Not to be sheltered by the Act of Limitations. *Kemp v. The Commonwealth.*—85.

RECORD.

1. An affidavit, filed in support of a motion for a continuance, is not a part of the record, unless made so by a bill of exceptions. *Garland v. Bugg.*—374.

2. See VERDICT, No. 11.

REINSTATING INJUNCTIONS.

See PRACTICE, No. 18.

RELEASE.

1. A release to *one* of *several* persons who were guilty of a joint trespass, operates as a release to all. *Ammonett v. Harris* and *Turpin.*—498.

2. Under what circumstances a release may be presumed. See EVIDENCE, No. 2.

RELINQUISHMENT OF RIGHT.

1. What circumstances admitted as presumptive proof of, and allowed to be proved by *parol* evidence *against a deed. Bigger's adm'r. v. Alderson.*—54—55.

2. A contract under seal decreed to be set aside (as having been vacated and abandoned) upon *circumstantial* evidence, without any acknowledgment under seal of such abandonment. *Cringan* and *Atcheson v. Nicholson's ex'ors.*—429—449.

REMAINDERS.

1. Contingent, created in a devise, where *good;* the contingencies not being too remote. *Smith* and *wife v. Chapman.*—240.

RENT.

1. Not to be demanded by the vendor of a tract of land which was delivered, by mistake, to the vendee, and of which he was *evicted. Nelson v. Suddarth.*—350—361.

RESTITUTION. *See* BILL IN CHANCERY, No. 9.

RETURN.

1. The want of the sheriff's return on an execution is no ground for reversing a judgment obtained on a forthcoming bond taken in pursuance thereof. *Jones* and *others v. Hull.*—212.
2. See SHERIFFS, Nos. 1—4.

REVIEW. *See* BILL OF REVIEW.

REVIVOR.

1. Against *whom* a suit in chancery for a conveyance of land ought to be revived, in case the defendant dies before a final decree. *Key's ex'ors. v. Lambert.*—330—331.

See BILL OF REVIVOR, No. 1.

RULES.

1. Of the Supreme Court of Appeals. I, II, III, and 409.
2. Of practice of the Superior Court of Chancery. IV, V, VI, VII, and 19.

SCALE OF DEPRECIATION.

See DEPRECIATION.

SCIRE FACIAS.

1. Where two terms of the Court of Appeals have elapsed, since the appeal, and before the record is brought up, the administrator of the appellee may have the appeal dismissed, on *motion*, without resorting to a *scire facias*. *Meek* and *others v. Baine.*—339.

SECURITY.

1. For prosecuting an injunction, when insufficient, new security to be given. *Ross v. Pleasants, Shore, & company* and *others.*—1.
2. For executors or administrators cannot be sued in equity until a *devastavit* is fixed upon the principal, in a previous suit, except under peculiar circumstances.—*Bacheldor. v. Elliott's adm'r.* and *others.*—10—12.
3. Not to be required of executors or administrators on obtaining injunctions, appeals, writs of error or supersedeas. *Wilson v. Wilson's adm'r.* and *others.*—15—16.
4. Nor on a motion to discharge an attachment in chancery. *Ibid.* 16.
5. In what case legatees jointly appealing with executors may be ruled to give security. *Sadler's ex'ors. and legatees, v. Green.*—26—27.

SEQUESTRATON, WRIT OF.

1. Cannot be issued on a sheriff's return of "*non est inventus*," upon an attachment for contempt. *Hook v. Ross.*—310—311.
2. What are the *regular proceedings*, whereon to ground it. *Ibid.*—319.

SET-OFF.

1. The delivery of goods to an individual partner cannot be set off against a partnership demand.—*Armistead v. Butler's adm'r.*—176.

SHERIFFS.

1. A sheriff's return of the service of a decree *nisi*, or of any paper not directed to him in his *official* capacity ought to be verified by *affidavit*. *Anonymous.*—206.
2. In what case a sheriff is not to be attached for *contempt* of the Court of *Appeals* for carrying into effect an execution under a decree from which an appeal has been granted. *Cheshire v. Atkinson.*—210.
3. See RETURN, No. 1.
4. If the sheriff returns a writ executed, and the *name* of the appearance-bail, but does not return the *bail-bond, or a copy thereof*, to the clerk's office, together with the writ, judgment ought not to

be entered against the defendant and *bail*, but against the defendant and the *sheriff*. *Shelton v. Pollock & Co.*—424.

5. In what manner a sheriff, who indulged a man for his taxes, in consideration of which, the latter agreed to indemnify him by paying all damages which the commonwealth might recover of him in consequence of his failing in due time to pay the said taxes into the treasury,—was allowed to recover the amount of such taxes; part being in *specie* and part in *certificates*. *Lipscomb's adm'r. v. Littlepage's admr.*—453—470.

SLAVES.

1. Where *white* persons, or native American *Indians*, or their descendants in the maternal line, are claimed as slaves, the *onus probandi* lies on the claimant. *Hudgins v. Wrights.*—134.
2. Otherwise with respect to native *Africans* and their descendants. *Ibid.*
3. *It seems* that no native American *Indian* could be made a slave under the laws of Virginia, since the year 1691. *Ibid.*

☞ See INDIANS, No. 2.

4. Claiming freedom, under the Act of 1792, on the ground of having been brought into this State, &c., must appear to have been detained *by compulsion*, and *contrary to law*. *Henderson v. Allens.*—235.
5. Deed for, held good, though a blank left for the *date*, which was afterwards filled up by the *donee*. See DATE, No. 1.
6. Emancipated by a last will and testament, may, under certain circumstances, be sold *for a term of years* to satisfy the debts of the decedent. *Patty, &c. v. Colin, &c.*—519—521.

See EMANCIPATION OF SLAVES, No. 1.

SPECIAL VERDICT.

1. In a special verdict, the jury ought not to find the *evidence*, and submit to the court to determine whether certain *facts* are to be inferred from it; but should find the *facts explicitly*, and submit to the court the *questions of law* arising thereupon. *Henderson v. Allens.*—235.

See VERDICT, No. 5.

SPECIFIC PERFORMANCE.

1. A person being within the commonwealth may be decreed to execute a conveyance for lands, lying in another State. *Guerrant v. Fowler* and *Harris.*—5—6.
2. After action *at law*, commenced for *damages*, the defendant has no right to file a bill in equity to compel the plaintiff to accept of specific performance, except under peculiar circumstances. *Long v. Colston.*—110.
3. The court ought not, in lieu of, to decree *a sum of money absolutely*, but may *conditionally*; giving the defendant his *election*, either to pay the money, or to perform the agreement *specifically*. *Hook v. Ross.*—310.
4. Where the defendant is guilty of *contumacy*, and the court, from the want of evidence, *which he is bound to disclose*, is not able to direct *specific* performance, a sum of money may, in like manner be decreed to compel the production of *such evidence*. *Ibid.*

STALE DEMANDS.

1. When a jury have found a verdict for the plaintiff in an action of debt on a bond, on account of

transactions, which (although partly subsequent to the date of the bond) are old and stale, ought not to be allowed, for the purpose of obtaining a discount against it. *Randolph's ex'or. v. Randolph's ex'ors.* and *others.*—181.

STATUTE OF FRAUDS AND PERJURIES.

See AGREEMENT, NOS. 1, 2.

STATUTE OF LIMITATIONS.

See LIMITATIONS, ACT OF.

STATUTES. *See* ACTS OF ASSEMBLY.

SUFFICIENCY OF EVIDENCE.

1. To be left *wholly* to the consideration of the jury, and the court ought not to instruct them that, *from the whole testimony before them, &c. Fisher's ex'or. v. Duncan* and *Turnbull.*—564.

SUPERSEDEAS.

1. If merely *auxiliary* to the proceedings, may be granted *in court*, notwithstanding the Act of 1806, ch. 22, sect. 4. *Cheshire v. Atkinson.*—210.
2. Ought not to be granted to a person not appearing to be interested in the matter in controversy. *Sayre v. Grymes.*—404.
3. Nor by the Court of Appeals to a judgment or decree of a *county court. Cheshire v. Atkinson.*—562.

SUPPLEMENTAL BILL. *See* BILL OF REVIEW, NO. 4.

SURPLUSAGE.

1. If an award, which is good in other respects, contain a matter not mentioned in the submission it shall not thereby be vitiated; but the additional matter ought to be rejected as *surplusage. Taylor's adm'r. v. Nicholson.*—67.

TERMS

1. Of the Supreme Court of Appeals. See APPEALS, SUPREME COURT OF.
2. Of the Superior Courts of Chancery. See CHANCERY, SUPERIOR COURT OF.

TOBACCO.

1. In an action of debt upon a writing obligatory for the payment of *tobacco* under a *pecuniary* penalty, the verdict should be for the penalty, to be discharged by *damages*, and not by *tobacco. Overstreet, &c. v. Marshall.*—381.
2. Inspectors of tobacco are entitled to an allowance of fifty dollars *for each hand over two*, kept, by virtue of an order of court, as labourers at their warehouses. *Branch, &c. v. the Commonwealth.*—479—488.

TRESPASS, ASSAULT AND BATTERY.

See ASSAULT AND BATTERY.

TRESPASS.

1. A release to *one* of *several* persons who are guilty of a *joint* trespass operates as a release to all. *Ammonett v. Harris* and *Turpin.*—498.

TRIAL.

See NEW TRIAL.
ASSUMPSIT, NO. 2.
EVIDENCE, NO. 3.

TROVER.

See HUSBAND AND WIFE, NOS. 1, 2.
WITNESS, NOS. 1, 2.

TRUST.

See HUSBAND AND WIFE, No. 3.
DETINUE, No. 3.
DOWER, No 1.
MARRIAGE SETTLEMENT, Nos. 1, 2.

USURY.

1. It is not usurious, upon a settlement of accounts, to take a bond or note for the balance, *including the interest then due*, and to receive interest on such bond or note. *Brown v. Brent.* No. 4.

VARIANCE.

1. Between the evidence and case stated by the plaintiff not to be regarded in suits for freedom. *Hudgins v. Wright.*—134.

VENIRE FACIAS DE NOVO.

1. When to be awarded. *Robinson's adm'r. v. Brock.*—212. *Henderson v. Allens.*—235. *Pegram v. Isabel.*—387.

VERDICT

1. *Unconditional*, not error, on a demurrer to evidence, provided the demurrer be afterwards determined by the court. *Bigger's adm'r. v. Alderson.*—54.
2. In *detinue*, may value slaves at higher rates than those laid in the declaration. *Ibid.*
3. After verdict, if the evidence does not appear on the record, all must be presumed to have been legal and right. *Ford v. Gardner* and *others.*—72.
4. Plea of *not guilty* to an action of covenant cured by. *Hunnicutt v. Carsley.*—153.
5. SPECIAL, when insufficient, and a *venire de novo* awarded. *Robinson's adm'r. v. Brock.*—214. *Henderson v. Allens.*—235. *Pegram v. Isabel.*—387.
6. Ought not to find the *evidence of facts*, but the *facts themselves. Henderson v. Allens.*—235. See SPECIAL VERDICT, No. 1.
7. See HEIR, No. 2.
   PLEADING, Nos. 5, 6.
8. In *detinue*, the defendant pleaded *non detinet*, and a special plea in bar, on which, *issues* were joined. A *general verdict for the plaintiff* was sufficiently responsive to both the issues. *Garland v. Bugg.*—375.
9. How the verdict and judgment ought to be on a bond given in the paper-money times, in a *pecuniary* penalty, conditioned for the payment of *tobacco*. See ACTION, No. 5, *and the case of Overstreet v. Marshall.*—381.
10. In what case a verdict ought not to be set aside on *affidavit* of two of the jurors. *Price's ex'or. v. Fuqua's adm'r.*—385.
11. *Quere.* How far, in a suit for freedom, can the record of a previous recovery of freedom by a female ancestor of the plaintiff (*not against the defendant, but another person*) be given in evidence? *Pegram v. Isabel.*—387.

☞ This point has since been settled in the *same cause*, which again came up to the Court of Appeals, and was decided in March 1808. According to that decision, the record was admitted, *as evidence that the person, in whose favour the judgment therein recorded was rendered, was entitled to freedom*, but not as *conclusive* evidence in favour of the plaintiff in the subsequent action.

12. When a verdict is erroneous by finding damages severally against several *joint* defendants in an action of assault and battery. *Ammonett v. Harris* and *Turpin.*—490.
13. How such error may be cured. *Ibid.*

14. After two concurring verdicts for the same party, on an issue out of chancery, the chancellor is not bound to direct a new trial, though both verdicts were in opposition to the opinions of the Judges. See ISSUE OUT OF CHANCERY, No. 7.
15. See NEW TRIAL, No. 4.

WARRANTY.

1. Where land is sold with warranty, and the vendee is *evicted*, he ought to recover of the vendor, not the value of the land *at the time of eviction*, but the *purchase-money*, with interest and costs. *Lowther v. The Commonwealth.*—202.

WASTE, INJUNCTION TO STAY.

1. Proper subject for jurisdiction of a court of equity, though another remedy given by act of assembly. *Harris v. Thomas.*—18.

WHITE PERSONS.

1. When claimed as slaves, on whom the *onus probandi* lies. See ONUS PROBANDI, No. 1.

WIFE.

1. How far the wife is a *competent* witness where the husband is *not immediately* interested. See HUSBAND AND WIFE, Nos. 1, 2. WITNESS, Nos. 1, 2.

WILLS.

1. After *probate*, any person interested, who had not appeared and contested it, may within seven years file a bill in chancery to contest its validity. *Ford v. Gardner, &c.*—73.
2. Any such person, even though he had appeared and contested the *probate*, may file a bill on the ground of *fraud unknown to him at the time of the probate.*—*Ibid.*
3. Notwithstanding a will has been admitted to record in a *district* court, a *county* court in chancery may try its validity. *Ib.* 74.
4. Construction of, since the several acts for docking entails. *Smith* and *wife v. Chapman.*—241, *and Eldridge* and *another v. Fisher.*—559.
See DEVISE, Nos. 1, 2, 3.
5. *Quere.* Is a bequest of *personal estate* "to the Baptist Association that, for ordinary, meets at "Philadelphia, annually, to be a "perpetual fund for the education of youths of the Baptist denomination, who shall appear "promising for the ministry, always giving a preference to the "descendants of the testator's father," sufficiently *definite* and *certain* to be carried into effect? *Jones v. Hart's ex'ors.*—471—476.
6. See CORPORATION, No. 1.
7. See EVIDENCE, Nos. 10, 11.
8. The circumstance, that a writing exhibited for probate as a last will and testament, was *wholly* written by the testator himself, is *prima facie* evidence that he was in his senses, and able to make a will, at the time of writing the same; so that the *onus probandi* lies on those who wish to impugn it. *Temple* and *Taylor v. Temple.*—476.
9. In such a case, proof that the testator's intellects were greatly impaired by the use of opium and ardent spirits, and that, in consequence thereof, he was frequently incapable of business, is not sufficient to repel the presumption; without proof that such was his condition, *at the time when the writing was executed. Ibid.*
10. Grammatical inaccuracies, want of knowledge of points of law, or

omissions of part of the testator's property, are not circumstances sufficient to vitiate a will. *Ibid.*

WITNESS.

1. In suits, in which the husband is not *immediately* and *certainly* interested, but may be so *eventually*, the wife is a *competent* witness; but the jury are to judge of her credibility. *Baring v. Reeder.*—154.

2. In trover by R. against B., for goods which had been lent by B. to the wife of C., and conveyed by C. to R., the wife of C. is a *competent* witness. *Ibid.*

WRIT OF ERROR, *See* ERROR.

See EXECUTORS AND ADMINISTRATORS, No. 3.

See SUPERSEDEAS, Nos. 2, 3.

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